Supreme Court, U.S.
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No. 04-____

In the Supreme Court of the United States

ROBERT W. BERRY; DIANE L. SPENCER,
Petitioners,

v.

MERRILL LYNCH, PIERCE,
FENNER AND SMITH, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Federal Arbitration Act provides that an arbitration award may be vacated where "there was evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). Pursuant to 9 U.S.C. § 12, a motion to vacate an arbitration award must be served within three months after the arbitration award is filed or delivered.

If an arbitrator deliberately conceals material conflicts of interest that would support vacating the arbitration award, however, a party may not discover the grounds to support a motion to vacate within three months of delivery of the award. Given the tens of thousands of cases that proceed to arbitration each year, and the severely limited judicial review of arbitration awards, parties and the district courts need clear guidance as to whether 9 U.S.C. § 12 may be subject to equitable tolling principles, whether arbitrator (as opposed to party) misconduct may support equitable tolling, and whether such issues are to be decided summarily by the district courts or after discovery and hearing.

Petitioners respectfully request that certiorari be granted on the following questions:

1. Is the three-month time limitation contained in 9 U.S.C. § 12 for serving a motion to vacate an arbitration award subject to equitable tolling?

2. Can misconduct by an arbitrator support equitable tolling of the three-month time limitation contained in 9 U.S.C. § 12?

3. In determining whether a party has met the standard for demonstrating equitable tolling of the time limitation contained in 9 U.S.C. § 12, should a district court decide the matter summarily, or after discovery and hearing?

PARTIES TO THE PROCEEDING

Petitioners Robert W. Berry ("Berry") and Diane L. Spencer ("Spencer")(collectively, "Petitioners") presently are employed at Wachovia Securities (formerly known as First Union Securities). Petitioners are parties to this case in their individual capacities only. Petitioners have no corporate affiliation.

The respondent is Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch").

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 3a) and Order denying rehearing *en banc* (App. 1a) are not officially reported. The Order of the District Court (App. 12a) denying Petitioners' motion to vacate an arbitration award, also is not officially reported.

JURISDICTION

This case was commenced by Merrill Lynch in the District Court seeking injunctive relief pending arbitration. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332, in that the amount in controversy exceeded $75,000 and there was diversity of citizenship. The District Court, among other things, ordered arbitration and retained jurisdiction pending arbitration.

The Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291, in that this was an appeal from a final decision (App. 12a) of a district court.

The opinion of the Court of Appeals (App. 3a) was entered on February 26, 2004. Petitioners timely filed a motion for rehearing *en banc*. The Order (App. 1a) of the Court of Appeals denying rehearing *en banc* was entered on April 29, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. § 10, provides that

"(a) In any of the following cases the United States court in and for the district wherein the award was

made may make an order vacating the award upon the application of any party to the arbitration--

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

The Federal Arbitration Act, 9 U.S.C. § 12, provides:

"Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the

purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award."

STATEMENT OF THE CASE

This case arises out of an arbitration award (the "Award")(App. 17a) rendered on March 4, 2002, in an arbitration held under the auspices of NASD Dispute Resolution, Inc. ("NASD-DR"), captioned Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Robert W. Berry, Diane L. Spencer and First Union Securities Inc. v. John Inhouse (NASD Case No. 01-02983)(the "Arbitration"). The Chairman of the arbitration panel, whose conduct is at issue here, was Daniel Zeiser ("Zeiser").

In the Arbitration, Respondent sought certain injunctive relief against Petitioners arising out of the termination of Petitioners' employment with Respondent. Petitioners asserted various defenses and counterclaims, including but not limited to, age discrimination, retaliatory discharge and defamation. (App. 70a) On March 4, 2002, the arbitrators rendered their Award, granting Respondent's claims, and denying all Petitioners' counterclaims, except for a single counterclaim by Berry for defamation. (App. 17a)

A. The Failure To Disclose Arbitrator Conflicts

Zeiser was appointed to the panel of three arbitrators in or about late June 2001. (App. 49a, at ¶ 3) Zeiser was the Chairman of the arbitration panel, was responsible for all pre-hearing discovery rulings, and took the lead among the arbitrators in many rulings during the hearings. (Id.) In

connection with his appointment as Chairman of the arbitration panel, Zeiser made certain disclosure statements, including the following disclosure regarding Zeiser's prior interaction with the law firm acting as co-counsel for Petitioners, Ulmer & Berne LLP:

> "While employed by KeyBank National Association, Ulmer & Berne was one of the law firms KeyBank used in securities matters. While I did not work with Matthew Morelli or Ken Bravo, I did work with Michael Unger on two or three NASD disputes." (App. 60a-61a)

On or about January 9, 2002, prior to the commencement of the evidentiary hearings in the Arbitration, Zeiser further disclosed that he was acquainted with a witness in the case, a lawyer in Cleveland. (App. 49a, at ¶ 4)

At the commencement of the evidentiary hearings on January 14, 2002, Zeiser made a disclosure similar to the disclosure made in June 2001, to the effect that Zeiser had worked with Ulmer & Berne LLP when Zeiser was employed at KeyBank. (App. 50a, at ¶ 5; App. 67a)

In the Arbitration, Petitioners asserted counterclaims, among others, for age discrimination. (App. 70a) Under the NASD-DR disclosure requirements for arbitrators, Zeiser was required to disclose that a discrimination claim had been asserted against him. (App. 60a, at ¶¶ 14, 17) At no time before, during, or after, the evidentiary hearings did Zeiser disclose that Zeiser himself had been named as a defendant in a discrimination claim. (App. 50a, ¶ 7; App. 142a, at ¶ 5)

B. Petitioners Discovered the Conflicts More Than Three Months After The Award Was Delivered

Petitioners did not learn that Zeiser himself had been named as a defendant in a discrimination claim until July 19, 2002, when Petitioners' counsel received a copy of a New York Stock Exchange, Inc. ("NYSE") disclosure statement issued by Zeiser unrelated to the Arbitration. (App. 141a, at ¶ 4; App. 50a, at ¶ 8) Zeiser's NYSE disclosure statement disclosed that Zeiser himself had been named as a defendant in a discrimination claim. (App. 147a)

The Arbitration involved substantial counterclaims of discrimination brought by Petitioners (App. 70a, 113a), and it certainly would have been material to know that the Chairman of the panel was, or recently had been, a defendant in a discrimination suit. Had Zeiser disclosed that he had been a defendant in a discrimination claim, Petitioners would have requested that Zeiser be removed from the arbitration panel. (App. 50a, at ¶ 7; App. 141a, at ¶¶ 3, 5)

After receiving Zeiser's NYSE disclosure statement on July 19, 2002, Petitioners' counsel forwarded a copy to his co-counsel at Ulmer & Berne LLP. Petitioners' counsel also began to investigate public sources of information in an attempt to find some case-reference to the discrimination claim in which Zeiser had been a defendant. (App. 142a, at ¶ 6)

On August 9, 2002, Petitioners' counsel checked the public website for the Cuyahoga County Court of Common Pleas, which permits name searches. By doing a name search for Zeiser, Petitioners' counsel was able to obtain a printout of the docket sheet and party information sheet in a case captioned Marvin J. Feldman et al. v. Ameritech et al. (the

"Common Pleas Lawsuit"). (App. 142a, at ¶ 7; App. 149a) As reflected therein, Zeiser was a named party plaintiff in the Common Pleas Lawsuit, which commenced in July 2000 and ended in July 2001. (Id.) One of the defendants in the Common Pleas Lawsuit was being defended by Edward P. Simms, Esq., an associate attorney at Ulmer & Berne LLP. (Id.; App. 151a, at ¶ 2) Zeiser himself participated in various aspects of the Common Pleas Lawsuit. (App. 151a, at ¶ 2) The attorney at Ulmer & Berne LLP handling the Arbitration for Petitioners did not know, and could not have known in the exercise of reasonable diligence, that an associate in a different group at his firm was defending a case brought by Zeiser. (App. 51a, at ¶ 11; App. 151a, at ¶ 3)

As of the date Petitioners filed the motion to vacate in the District Court, Petitioners had been unable to discover information as to the particulars of the discrimination claim in which Zeiser was a defendant. (App. 50a, at ¶ 9) Petitioners' efforts to discover this information continued from the moment their counsel received Zeiser's NYSE disclosure statement on July 19, 2002, without success. (Id.)

C. Proceedings In The District Court

On October 2, 2002, Petitioners filed a motion to vacate the Award, and to take discovery and present evidence at a hearing with regard to Zeiser's conflicts. (App. 44a-45a) On October 31, 2002, the District Court denied the motion to vacate on the papers without evidentiary or other hearing, without specifically addressing that aspect of the motion as sought discovery and hearing. (App. 12a) The District Court held that the three month time limitation contained in 9 U.S.C. § 12 was not subject to equitable tolling, and that this Court's opinion in Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96, 111 S.Ct. 453, 458, 112 L.Ed.2d 435

(1990), was not controlling since Petitioners accused an arbitrator, rather than a party, of causing Petitioners to miss the three month deadline. (App. 14a-15a)

D. Proceedings in the Sixth Circuit

Petitioners timely appealed to the Court of Appeals for the Sixth Circuit. In support of the appeal, Petitioners relied upon University Commons-Urbana, Ltd. v. Universal Constructors Inc., 304 F.3d 1331, 1340 (11th Cir. 2002)("University Commons"), in which the Court of Appeals for the Eleventh Circuit held that where a party has presented evidence of an undisclosed arbitrator conflict of interest "the district court should have plunged headlong into evidentiary fact-finding," rather than a summary confirmation of the arbitration award. Id.

The Court of Appeals for the Sixth Circuit in this case affirmed the District Court. (App. 3a) The Court of Appeals noted in *dictum* that the District Court may have erred in holding that equitable tolling could not apply to 9 U.S.C. § 12 (App. 8a), and by limiting the application of equitable tolling to party misconduct. (App. 6a) The Court of Appeals noted that other Circuits, by contrast, have suggested that equitable tolling may not be available. (App. 7a) The concurring Judge in the Sixth Circuit expressed clearly that she would have held (contrary to the other Circuits that have visited the issue) that "equitable tolling is applicable to the three month limitation period under 9 U.S.C. § 12." (App. 10a-11a)

The Court of Appeals, however, did not address that part of the appeal as sought to remand the case, pursuant to University Commons, supra, to the District Court for discovery and hearing prior to a ruling as to equitable tolling. Instead, the Court of Appeals held that Petitioners had not

proven entitlement to equitable tolling, assuming *arguendo* that the doctrine applied. (App. 9a)

Petitioners moved for rehearing *en banc* based upon the clear conflict between the Sixth Circuit's failure to remand the case for discovery and hearing, and the Eleventh Circuit's requirement of discovery and hearing in University Commons, supra. (App. 27a) The motion for rehearing was denied. (App. 1a)

REASONS WHY THIS PETITION SHOULD BE GRANTED

This Court has held that the lower courts "should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968). The important legal issues raised in this Petition are part and parcel of ensuring the fairness of the arbitration process which is at the heart of this Court's enforcement of agreements to arbitrate. E.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991); Mitsubishi Motors Corp. v. Soler, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

A. As To The First Question Presented: The Circuit Courts Conflict As To Equitable Tolling

The District Court decided this case summarily based upon a holding that the three month limitation in 9 U.S.C. § 12 was not subject to equitable tolling, or in any event, that equitable tolling could not be invoked where the misconduct was by an arbitrator rather than a party. (App. 14a-15a) In

light of such a holding, the District Court avoided addressing the holding of the Eleventh Circuit in University Commons, supra, requiring discovery and hearing.

The District Court's holding as to equitable tolling relied upon, in substantial part, the Second Circuit holding in Florasynth v. Pickholz, 750 F.2d 171 (2d Cir. 1984) that there are no common law exceptions to the three-month time limitation of 9 U.S.C. § 12. Several other Courts of Appeal have expressed agreement with the Second Circuit's view, but have declined to rule on the issue of equitable tolling on the facts of the cases before them. Fradella v. Petricca, 183 F.3d 17, 21 (1st Cir. 1999)("[w]e need not consider whether the deadline prescribed in FAA § 12 is subject to such equitable tolling, since Fradella has not generated a trialworthy issue as to his entitlement to invoke tolling"); Cullen v. Paine, Webber, Jackson & Curtis, Inc., 863 F2d 851, 854 (11th Cir. 1989)("[w]e need consider neither the contours nor the existence of such an exception [for due diligence], for, even if an exception might be proper in some circumstances, Cullen has alleged insufficient facts" to support such exception); Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986)("[w]e do not consider, however, whether due diligence or tolling rules are proper exceptions to the limitations period prescribed by the Federal Arbitration Act, for we conclude that Taylor did not, in any event, act with due diligence...."); Piccolo v. Dain, Kalman & Quail, Inc., 641 F.2d 598, 601 (8th Cir. 1981)("[a]lthough the existence of a 'due diligence' exception may be questioned, the Piccolos efforts to comply with [the time limitation] would not qualify for this exception in any event").

Here, the Sixth Circuit expressed possible disagreement with the holdings of the other Courts of Appeal as to equitable tolling, without deciding the issue. (App. 7a-8a) The

concurring Judge would not have avoided deciding the issue, and would have held contrary to the other Courts of Appeal, that equitable tolling may apply to 9 U.S.C. § 12. (App. 10a-11a) On the issue of equitable tolling, based on the Opinion below, the Sixth Circuit appears to stand in conflict with the Second Circuit as well as the several other Circuits which have expressed their position against equitable tolling.

This mix of authority leaves a great deal of uncertainty in the lower courts as to whether equitable tolling may be raised with regard to the three month time limitation in 9 U.S.C. § 12. This Court should decide this issue once and for all, as this Court has done with other federal time limitations. E.g., Irwin v. Department of Veterans Affairs, supra, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (Title VII statutory time limits for filing claim are subject to equitable tolling); see also, Young v. United States, 535 U.S. 43, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002)(three-year lookback period allowing Internal Revenue Service to collect taxes against a debtor is subject to equitable tolling during pendency of Chapter 13 proceeding); Rotella v. Wood, 528 U.S. 549, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000)(recognizing possible application of equitable tolling to RICO statute); United States v. Beggerly, 524 U.S. 38, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998)(equitable tolling is not available in a suit under the Quiet Title Act); United States v. Brockamp, 519 U.S. 347, 117 S.Ct. 849, 136 L.Ed.2d 818 (1996)(equitable tolling does not apply to limitations period on tax refund claims).

B. As To The Second Question Presented: Answering Whether Arbitrator Misconduct May Justify Equitable Tolling Is Inextricably Intertwined With The First Question Presented

The Sixth Circuit suggested that equitable tolling may be available even where the conduct causing the delay is conduct of an arbitrator. (App. 6a) While no other Circuit has ruled on this direct point, and thus there is no direct conflict among the Circuits, the question of whether arbitrator misconduct may support equitable tolling is inextricably intertwined with the first question presented, as to whether equitable tolling may apply at all. In the event the Court grants certiorari as to the first question, we respectfully suggest that certiorari be granted as to the second question as well.

C. As To The Third Question Presented: The Sixth Circuit Conflicts With The Eleventh Circuit

The Sixth Circuit did not remand to the District Court even though the District Court had foreclosed inquiry into the facts of Zeiser's concealment by holding that equitable tolling may not apply. The District Court, accordingly, disregarded the express requirement of the Eleventh Circuit in University Commons, supra, 304 F.3d 1331. In University Commons, the parties placed in issue whether an arbitrator had made proper disclosure of the arbitrator's relationship with one of the counsel in the arbitration, with whom the arbitrator was co-defending an unrelated case. After initially allowing discovery, the District Court reversed itself, and ordered that there be no discovery taken as to the arbitrator's conflicts. The Court of Appeals reversed, finding that discovery and an evidentiary hearing were required.

The Eleventh Circuit first observed the nature of the alleged conflict, that the arbitrator was counsel in a case in which one of the parties' arbitration counsel represented a co-defendant. The Eleventh Circuit found that "[i]f this allegation is true, then [the arbitrator], at least, would have appeared to be biased" in favor of the party in the arbitration represented by such co-counsel. 304 F.3d at 1340. The Court held that "serving as the decision-maker in one action in which a colleague in another action represents a party clearly poses the possibility of bias, and thus represents a potential conflict that a reasonable person would easily recognize." 304 F.3d at 1341. The Court went on to find that "[a]t this point, the district court should have plunged headlong into evidentiary fact-finding," rather than a summary confirmation of the arbitration award. Id. "Of course," the Court further noted, "discovery would have been needed as to all of these issues." 304 F.3d at 1342.

Here, the facts supporting the need for discovery and an evidentiary hearing were even more impressive than in University Commons. Here, the conflict was not that Zeiser was counsel in another case opposite Petitioners' counsel. Rather, Zeiser was *a party* in a lawsuit opposite Petitioners' counsel. Additionally, Zeiser failed to disclose that he was the subject of a discrimination claim, even though this case involved counterclaims of discrimination and NASD-DR rules required such disclosure.

Zeiser's non-disclosures went to the heart of the integrity of the Arbitration. Under NASD-DR arbitrator disclosure guidelines (App. 58a-60a), an arbitrator who has a conflict as to the counsel in the arbitration or the subject matter of the arbitration, must disclose such conflict. Here, Zeiser had a conflict as to both the counsel and the subject matter, and disclosed neither. Because of the difficulty of vacating an

arbitration award, the integrity of arbitrators is paramount. It is for this reason that the 11th Circuit, in University Commons, required that discovery and an evidentiary hearing be held as to an arbitrator's failure to disclose conflicts of interest.

Here, by contrast, the Sixth Circuit failed to follow the Eleventh Circuit's holding in University Commons. The Sixth Circuit affirmed the summary disposition of this matter without remanding for discovery and hearing. This Court should resolve whether a district court, when addressing concealment of arbitrator conflicts, should decide the matter summarily, or after discovery and hearing.

CONCLUSION

The Court should grant this Petition for certiorari.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 02-4282

[Filed April 29, 2004]

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INC., Plaintiff-Appellee,	)
v.	)
ROBERT W. BERRY, ET AL., Defendants-Appellants.	)

BEFORE: BOGGS, Chief Judge; GUY, Circuit Judge; and HOOD,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* Hon. Denise Page Hood, United States District Judge for the Eastern District of Michigan, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 02-4282

[Filed February 26, 2004]

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., Plaintiff-Appellee,

v.

ROBERT W. BERRY and DIANE L. SPENCER, Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Ohio. 01-01357. Gwin. 10-31-02.

JUDGES: Before: BOGGS, Chief Judge; GUY, Circuit Judge; and HOOD, District Judge.* HOOD, District Judge, concurring.

* The Honorable Denise Page Hood, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

PER CURIAM. Defendants-Appellants Robert Berry and Diane Spencer appeal from the district court's denial, on statute of limitations grounds, of their motion to vacate an arbitration panel's award. We affirm the decision of the district court.

Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") brought this action against Defendants, who had previously worked for Merrill Lynch as stockbrokers. Merrill Lynch claimed breach of non-solicitation and non-competition agreements, and related torts. Defendants brought several counterclaims, including age discrimination and retaliatory discharge. The district court stayed proceedings pending binding arbitration by an NASD panel. On March 4, 2002. the arbitration panel granted Merrill Lynch's claims and granted Defendants' claim for defamation, only and awarded Merrill Lynch injunctive and net financial relief.

Over four months later, on July 19, 2002, Defendants allegedly became aware of a possible conflict of interest on the part of Daniel G. Zeiser ("Zeiser"), the chairman of the arbitration panel. Defendants received a copy of a disclosure statement created by Zeiser in his role as an NYSE arbitrator, which states that Zeiser had once been named as a defendant in a discrimination charge (the "Discrimination Charge"). Zeiser's disclosure statement gave no other details, except that the matter was settled favorably to him. Defendants do not know when Zeiser first disclosed this matter to NYSE arbitration users.

Defendants began research to uncover the facts of the Discrimination Charge. They uncovered no further details about it. but their search for Zeiser's name on the website of

the Cuyahoga County Court of Common Pleas (Zeiser's home county) revealed a second possible conflict. Zeiser had been a plaintiff in a lawsuit (the "Common Pleas Lawsuit") in which one defendant had been represented by an attorney in the firm of Ulmer & Berne LLP. Different Ulmer & Berne attorneys are local counsel for Defendants in the case before us. The Common Pleas Lawsuit was settled and dismissed at just about the date that Zeiser was appointed to the arbitration panel.

Zeiser had disclosed neither of these possible conflicts of interest to Defendants. Zeiser had, however, disclosed other matters. Notably, he disclosed that he had worked with (not against) yet another Ulmer & Berne attorney on various matters for Zeiser's former employer First Union before the arbitration.

Under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., an arbitration award may be vacated upon motion if "there was evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). Evident partiality is found "only where a reasonable person would have to conclude that an arbitrator was partial to one party in the arbitration." *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 328-29 (6th Cir. 1998) (quotation omitted). Bias must be "direct, definite, and capable of demonstration, and the party asserting it must establish specific facts that indicate improper motives on the part of the arbitrator." *Id.* at 329 (quotation omitted). The motion to vacate must be filed within three months of the panel's decision. 9 U.S.C. § 12.

Defendants concede that mere failure to disclose, in and of itself, is not grounds to vacate the award. *ANR Coal Co. v. Cogentrix of N.C. Inc.*, 173 F.3d 493, 499 (4th Cir. 1999). Nevertheless, based on Zeiser's allegedly suspicious pattern

of partial disclosure. Defendants moved in the district court to vacate the award. The motion was filed on October 2, 2002. almost seven months after the arbitration award was rendered. The district court denied the motion as untimely, and Defendants appeal.

II

Defendants sought to have the FAA limitations period equitably tolled. The district court held that equitable tolling cannot be based on non-party fraud. Because this holding was a matter of law, our review is *de novo*. *Dunlap v. Orr*, 250 F.3d 1001, 1008 n.5 (6th Cir. 2001).

The district court relied entirely on *Geromette v. GMC*, 609 F.2d 1200, 1203 (6th Cir. 1979), *cert. denied*, 446 U.S. 985, 64 L. Ed. 2d 841 (1980), which found equitable tolling inappropriate inasmuch as the plaintiff had not alleged fraud by the defendant. The plaintiff had not, however, alleged non-party fraud either. Since equitable tolling is most often based on adverse-party fraud, it is natural that *Geromette* highlighted the absence of this circumstance, but our opinion did not hold that adverse-party fraud is the only possible equitable reason to toll a limitation period. "Courts have not hesitated to at least consider and in some circumstances apply equitable tolling in contexts in which the [non-movant] employer's conduct has not caused the [movant] employer to delay." *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988) (quoting *Fox v. Eaton Corp.*, 615 F.2d 716, 718 (6th Cir. 1980)). Indeed, the *Andrews* court tolled the statutory period because the lower court had issued a confusing order--a problem caused by the adjudicator, not by the adverse party. *Ibid.* We generally consider several non-exclusive factors to decide whether to toll: 1) the movant's lack of actual or constructive notice of the filing requirement; 2) the movant's

diligence in pursuing his rights; 3) an absence of prejudice to the non-movant; and 4) the movant's reasonableness in remaining ignorant of the filing requirement. *Ibid.* All factors need not be present, but the third factor alone cannot justify tolling. *Vroman v. Brigano*, 346 F.3d 598, 601 (6th Cir. 2003).

Merrill Lynch urges that the deference given to an arbitrator's decision forecloses equitable tolling. *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175-77 (2d Cir. 1984) (in dictum. "role of arbitration as a mechanism for speedy dispute resolution disfavors delayed challenges to the validity of an award"); *accord Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986) (dictum); *see also Piccolo v. Dain, Kalman & Quail, Inc.*, 641 F.2d 598, 601 (8th Cir. 1981) (due diligence exception to limitations period "doubtful"). Defendants, on the other hand, remind us that courts "should, if anything be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968).

This court has not had occasion to decide whether arbitration vacatur motions are subject to equitable tolling. Merrill Lynch's proposed extension of the oft-cited general policy of deference to arbitration may be unwarranted. It is clear that the FAA reflects Congressional approval of the speed and finality of arbitration; but Congress enacted the statute, not a policy. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501, 108 S. Ct. 1350, 99 L. Ed. 2d 582 (1988) ("unenacted approvals, beliefs and desires are not laws.") Where the FAA is silent,

the courts must decide how to apply equitable rules in FAA-related court proceedings.

The speed and finality of arbitration come at the cost of procedural niceties, but this tradeoff is considered merely a choice of forum because it does not impair the arbitrants' substantive statutory rights. *Mitsubishi Motors Corp. v. Soler*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). Arbitrator bias, however, is grounds for vacatur precisely because it makes that forum unable to provide a "fundamentally fair hearing." *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 625 (6th Cir. 2002); *and see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-31, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) (arbitration is adequate forum for resolution of discrimination claims because disclosure rules and 9 U.S.C. § 10(a) guard against bias). The general pro-arbitration policy relies on the assumption that the forum is fair, and therefore cannot justify special deference to arbitration outcomes in the face of a colorable claim that the forum was unfair in a particular case. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) (arbitrator's "honest judgment" may not be reviewed, but "of course, decisions procured by the parties through fraud or through the arbitrator's dishonesty need not be enforced").

On the other side of the equation, the possibility that awards may on occasion be belatedly challenged does not seem to strongly invoke the policy concern for speed and finality. The procedure would remain just as speedy, since awards would not be stayed between the end of arbitration and the belated motion, and rarely if ever stayed upon filing of the motion. Finality, too. is only very slightly affected, because the bar for equitable tolling is quite high. *See, e.g., Hobet Mining, Inc. v. United Mine Workers.* 877 F. Supp. 1011,

1018 (S.D. W.Va. 1994). And an arbitral loser cannot effectively delay payment by threatening to file an unfounded vacatur motion, because the FAA provides for enforcement motions in the event of such foot-dragging tactics.

However, we need not resolve this issue today, because the facts of this case clearly do not merit equitable tolling. The first and fourth *Andrews* factors weigh against Defendants, who were well aware of their time limit, and the third factor weighs against Merrill Lynch. The second factor, Defendants' diligence, may be dispositive in such cases. *See Irvin v. Dept. of Veteran's Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). And Defendants were not diligent.

Between the appointment of the panel in June 2001 and the beginning of hearings in January 2002, Defendants had seven months to discover that one of their own attorneys had prior contacts with Mr. Zeiser in the Common Pleas Lawsuit. Moreover, a diligent inquiry into the arbitration panel should surely have included a name-based search on the chairman's local court's website. This court will not encourage strategic negligence by arbitrants.

Defendants assert that they have now searched for records of the Discrimination Charge against Zeiser, and found none, so they cannot be held accountable for failing to uncover the matter earlier. But Defendants clearly failed to research Zeiser diligently in general, and so did not come to this equitable table with clean hands.

Defendants argue that Zeiser purposely lulled them into a false sense of security by disclosing his favorable connection to Ulmer, Berne. Merrill Lynch asserts that Zeiser in all likelihood did not know that the Common Pleas Lawsuit

attorney was an Ulmer, Berne associate, and did not report the discrimination charge because he thought of the dispute between Merrill Lynch and Defendants as an unfair-competition matter. More to the point, whether Zeiser was a scheming manipulator or an innocent, he is not, and is not colluding with, the adverse party in this case. His degree of fault, if any, cannot tilt the equitable balance between the litigants. Defendants should not have been lulled by such slight subterfuge, if subterfuge it was. Defendants assert that encouraging full arbitrator disclosure is a weighty matter of public policy, but even if such concerns could in some cases help justify tolling, they are not strongly impacted by Defendants' slight and speculative allegations against Zeiser. Defendants have failed to make out a case for equitable tolling.

III

Defendants filed too late. The statutory period cannot be equitably tolled, because they failed to safeguard their rights diligently. The district court's denial of their motion is therefore affirmed.

CONCUR BY: HOOD

CONCUR:

HOOD, District Judge, concurring in the majority's conclusion. I concur in the outcome of the majority opinion. However, it is my opinion that equitable tolling is applicable to the three month limitation period under 9 U.S.C. § 12. The Supreme Court has long held that the doctrine of equitable tolling "is read into every federal statute of limitations." *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S. Ct. 582, 585, 90 L. Ed. 743 (1946); *Honda v. Clark*, 386 U.S. 484,

501, 87 S. Ct. 1188, 1197, 18 L. Ed. 2d 244 (1967); *Zipes v. Trans World Airlines. Inc.*, 455 U.S. 385, 394, 102 S. Ct. 1127, 71 L. Ed. 2d 234. 455 U.S. 385, 102 S. Ct. 1127, 1133, 71 L. Ed. 2d 234 (1982); *Hallstrom v. Tillamook County*, 493 U.S. 20, 27, 110 S. Ct. 304, 309, 107 L. Ed. 2d 237 (1989): and *Irwin v. Dep't of Veterans Affairs*. 498 U.S. 89, 95-96, 111 S. Ct. 453, 457, 112 L. Ed. 2d 435 (1990). This court has recognized that the three months limitation period in 9 U.S.C. § 12 is a "statute of limitations." *See Occidental Chemical Corp. v. Int'l Chemical Workers Union*, 853 F.2d 1310, 1313 (6th Cir. 1988) and *Smart v. Ellis Trucking Co., Inc.*, 580 F.2d 215, 219 (6th Cir. 1978). In applying the factors set forth in *Andrews v Orr*. 851 F.2d 146, 151 (6th Cir. 1988), I agree with the majority opinion that Defendants have failed to make out a case for equitable tolling.

APPENDIX C\

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:01-CV-1357

[Filed October 31, 2002]

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, Plaintiff,	)
v.	)
ROBERT W. BERRY, et al., Defendants.	)

BEFORE: Judge James S. Gwin

ORDER

On October 2, 2002, defendants Robert W. Berry and Diane Spencer moved this Court to vacate an arbitration award rendered in the above captioned matter on the ground that the chairman of the arbitration panel that granted the award, Daniel G. Zeiser, was partial and did not disclose that partiality. Plaintiffs oppose the motion.

The arbitration involved the defendants counterclaims against plaintiff that alleged age discrimination and retaliatory discharge. Zeiser was the Chairman of the arbitration panel. On March 4, 2002, the arbitration panel awarded Berry damages but denied Spencer relief.

Defendants allege that on July 19, 2002, they became aware that Zeiser failed to disclose that a claim had been filed against him alleging employment discrimination and that he had a previous conflict with an attorney involved in the case.

Specifically, defendants allege that Zeiser did not report that, while employed at Key Bank, he was a defendant in a discrimination suit brought by a plaintiff who alleged that Zeiser improperly terminated his worker's compensation and disability benefits. Also, defendants allege that Zeiser did not report that he was a plaintiff is a lawsuit defended by an associate at Ulmer & Berne, plaintiffs' counsel in this matter. Defendants allege that Zeiser deliberately concealed his conflicts of interest to lull them into not objecting to him being the chairman of the arbitration panel.

The Federal Arbitration Act states that a district court "**may** make an order vacating the award upon the application of any party to the arbitration... (2) Where there was evident partiality or corruption in the arbitrators, or either of them ...." 9 U.S.C. § 10(a) (emphasis added). However, "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." *Id.* at § 12.

Defendants filed their motion to vacate well after the three month statute of limitations had expired. Defendants claim, however, that the statute of limitations should be equitably

tolled because they were unaware of Zeiser's alleged fraud when the statute of limitations expired.

The issue of equitable tolling for motions to vacate arbitration awards has not often been addressed in federal courts. However, courts that have addressed the issue have held that:

> [P]arties choose to arbitrate because they want quick and final resolution of their disputes. The role of arbitration as a mechanism for speedy dispute resolution disfavors delayed challenges to the validity of an award. Thus, when a party to an arbitration believes that he has been prejudiced in the proceedings by behavior that the Act condemns he must bring a motion to vacate within the allotted time. When the three month limitations period has ran without vacation of the arbitration award, the successful party has a right to assume the award is valid and untainted, and to obtain its confirmation in a summary proceeding.
>
> It is for these reasons that we hold, as have other circuits, that a party may not move to vacate after three months from the time the arbitration panel issued its award.

Florasynth v. Pickholz, 750 F.2d 171,177 (2d. Cir. 1984)(citing *Sheet Metal Workers' Int'l Ass'n Local 252 v. Standard Sheet Metal*, 699 F.2d 481 (9th Cir. 1983); *Service Employees Int'l Union Local No. 36 v. Office Center Services*, 670 F.2d 404, 412 (3d Cir. 1982); *Chauffeurs Local 135 v. Jefferson Trucking Co.*, 628 F.2d 1023, 1027 (7th Cir. 1980)). Parties have the right to assume that after the three month statute of limitations expires, the arbitration award is

valid and they may continue with their day to day activities without fear that the action may arise months or years later.

A case analogous to this matter was decided by the Eastern District of New York in *Pennsylvania Engineering Corp. v. Islip Resource Recovery Agency*, 714 F. Supp. 634 (E.D.N.Y. 1989). In that case, plaintiffs sought to avoid the Federal Arbitration Act's three month statute of limitations by claiming equitable estoppel on the ground that they were unaware of the arbitrator's bias. *Id.* at 638. The Eastern District of New York held that "[w]hether or not plaintiffs were aware of the Arbitrator's potential conflict of interest is irrelevant. The Act's statute of limitations provisions recognize no common law exceptions." *Id.* This Court agrees with the Eastern District of New York in its finding that there is no common law exception for an arbitrator's fraud that the parties were unaware of.

Defendants urge this Court to adopt the United States Supreme Court standard expressed in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 86, 89 (1990) -"[The Supreme Court has] allowed equitable tolling in situations... where the complainant has been induced or tricked by his adversary's misconduct in allowing the filing deadline to pass." *Id.* However, defendants do not allege that their adversary (the plaintiff) committed any misconduct that allowed the filing deadline to pass. Defendants allege that Zeiser, a nonparty, committed the fraud. As the Sixth Circuit has noted, nonparty fraud cannot be a basis for equitable tolling against one of the parties. *Geromite v. General Motors Corp.*, 609 F.2d 1200, 1203 (6th Cir. 1979).

For the foregoing reasons, this Court hereby denies defendants motion to vacate the arbitration award.

IT IS SO ORDERED.

Dated: October 31, 2002

/s/
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

APPENDIX D

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

Merrill Lynch, Pierce, Fenner & Smith, Inc.,
Claimant,

Vs.

First Union Securities, Inc.,
Respondent, and

Robert W. Berry and
Diane L. Spencer,
Respondents/Counterclaimants/Third-party Claimants,

Vs.

John J. Inhouse, III,
Third-Party Respondent.

Case Number: 01-02983
Hearing Site: Cleveland, Ohio

REPRESENTATION OF PARTIES

David F. McComb, Esquire, and Michael Fortunato, Esquire, of Rubin & Associates, P.C., Paoli, Pennsylvania,

represented Claimant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch").

William H. Falin, Esquire, of Moscarino & Treu, Cleveland, Ohio, represented Respondent First Union Securities, Inc. ("First Union").

William A. Jacobson, Esquire, of Kaplan & Jacobson, Inc., Providence, Rhode Island, and Kenneth A. Bravo, Esquire, of Ulmer & Berne, Cleveland, Ohio, as co-counsel for both parties, represented Respondents/Counterclaimants/Third-Party Claimants Robert W. Berry ("Berry") and Diane L. Spencer ("Spencer").

David F. McComb, Esquire, and Michael Fortunato, Esquire, of Rubin & Associates, P.C., Paoli, Pennsylvania, represented Third-Party Respondent John J. Inhouse, III ("Inhouse").

CASE INFORMATION

Merrill Lynch filed its Statement of Claim on or about June 6, 2001. Merrill Lynch did not file a signed Uniform Submission Agreement.

First Union filed its Statement of Answer on or about October 16, 2001. First Union did not file a signed Uniform Submission Agreement.

Berry and Spencer filed their joint Statement of Answer, Counterclaim and Third-Party Claim on or about: October 16, 2001.
Berry and Spencer both signed the Uniform Submission Agreement on October 23, 2001.

Merrill Lynch and Inhouse filed their joint Answer to Berry and Spencer's Counterclaim (against Merrill Lynch) and Third-Party Claim (against Inhouse) on or about October 31, 2001. Third-Party Respondent Inhouse did not file a signed Uniform Submission Agreement.

CASE SUMMARY

Merrill Lynch asserted the following causes of action in its Statement of Claim: breach of contract, misappropriation, conversion of trade secrets and business property, breach of fiduciary duty and unfair competition. Merrill Lynch sought and obtained temporary injunctive relief in United States District Court against Berry and Spencer on June 6, 2001. This arbitration was filed on that date and expedited as mandated by Rule 10335(g) of the NASD Code of Arbitration Procedure ("the Code").

Unless specifically admitted in its answer, Respondent First Union denied the allegations made in the Statement of Claim and asserted the following affirmative defenses: failure to state a claim upon which relief can be granted, waiver, estoppel, unclean hands, lack of mutuality and/or privity of contract, comparative negligence and failure to mitigate.

Unless specifically admitted in their joint answer, Berry and Spencer denied the allegations made in the Statement of Claim and asserted the following affirmative defenses: judicial estoppel and unclean hands.

In their joint Counterclaim and Third-Party Claim, Berry and Spencer asserted the following causes of action against Merrill Lynch and Inhouse: age discrimination, constructive discharge, retaliation, federal and state whistleblower claims,

wrongful termination, deceptive trade practices, tortious interference with business relations and defamation.

Unless specifically admitted in their joint answer to Berry and Spencer's Counterclaim and Third-Party Claim, Merrill Lynch and Inhouse denied the allegations therein and asserted the following affirmative defenses: failure to state a claim upon which relief can be granted, respondeat superior, speculative damages, waiver, estoppel, failure to mitigate, truth of allegedly defamatory statements, privilege, fair comment doctrine and justification.

RELIEF REQUESTED

Merrill Lynch requested permanent injunctive relief, unspecified compensatory damages and other unspecified relief. Merrill Lynch and Inhouse also requested that the claims against them be dismissed in their entirety.

First Union requested that the claims against it be dismissed in their entirety.

Berry and Spencer requested compensatory damages in excess of two million dollars, double damages, unspecified punitive damages, unspecified costs, unspecified attorneys' fees and other unspecified relief.

OTHER ISSUES CONSIDERED AND DECIDED

On or about August 14, 2001, First Union filed a motion to dismiss. On or about the same date, Berry and Spencer filed a joint motion to dismiss. On or about August 24, 2001, Merrill Lynch filed a consolidated response to both motions. On or about September 12, 2001, First Union filed a reply in support of its motion to dismiss. On or about the same date,

Berry and Spencer filed a joint reply in support of their motion to dismiss. On September 17, 2001, the Panel heard oral argument on the motions to dismiss. On September 18, 2001, the Panel denied both motions.

At the heating, Berry and Spencer moved for monetary and evidentiary sanctions against Merrill Lynch for failure to produce certain documents and information regarding employee complaints made against them. The Panel denied monetary sanctions, but limited Merrill Lynch to the presentation of certain evidence regarding previously identified employees.

Merrill Lynch, First Union and Inhouse did not file with NASD Dispute Resolution, Inc., properly executed submissions to arbitration, but are required to submit to arbitration pursuant to the Code and are bound by the determination of the Panel on all issues submitted.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the undersigned Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Robert W. Berry and Diane L. Spencer are jointly and severally liable for, and shall pay to Claimant Merrill Lynch, Pierce, Fenner & Smith, Inc., the sum of $250,000.00 (Two Hundred Fifty Thousand Dollars and No Cents) in damages for breach of contract.

2. Claimant Merrill Lynch, Pierce, Fenner & Smith, Inc., is solely liable for, and shall pay to

Respondent/Counterclaimant Robert W. Berry, the sum of $125,000.00 (One Hundred Twenty-five Thousand Dollars and No Cents) in damages for defamation.

3. All claims asserted against Respondent First Union Securities, Inc., are denied.

4. All claims asserted against Third-Party Respondent John J. Inhouse, III, are denied.

5. All claims asserted by Respondent/Counterclaimant Diane L. Spencer against Claimant Merrill Lynch, Pierce, Fenner & Smith, Inc., are denied.

6. Claimant Merrill Lynch, Pierce, Fenner & Smith, Inc., is awarded injunctive relief as follows:

   a. Respondents Robert W. Berry and Diane L. Spencer are prohibited from initiating any contact with any customers whom they serviced while employed by Merrill Lynch, Pierce, Fenner & Smith, Inc., except those customers whose accounts have already been transferred, until 5:00 (Five O'clock) pm, Eastern Daylight Time, on June 1, 2002.

   b. Respondents Robert W. Berry and Diane L. Spencer are permitted to speak and/or meet with any customers whom they serviced while employed by Merrill Lynch, Pierce, Fenner & Smith, Inc., only if such conduct is initiated by the customers.

c. Any new ACATS (Automated Customer Account Transfer System) transfers that arise from telephone conversations or meetings initiated by the customers may be processed by First Union Securities, Inc.

7. Unless specified otherwise herein, parties are to bear their own fees and costs.

8. Any and all other relief not addressed herein, including punitive damages, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution, Inc., will collect or retain the following non-refundable filing fees:

Initial claim filing fee	= $ 500.00
Counterclaim/Third-Party claim filing fee	= $ 500.00

Injunctive Relief Fee

NASD Dispute Resolution, Inc., will collect or retain the following non-refundable fee:

Injunctive Relief Surcharge	=$ 2,500.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firms are parties.

Member surcharge	=$1,200.00
Pre-hearing process fee	= $600.00

Hearing process fee = $2000.00

Forum Fees and Assessments

The Panel has the authority to assess forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) Pre-hearing sessions
with chairperson x $450 =$ 900.00
Pre-hearing conferences:
November 26, 2001 1 session
December 13, 2001 1 session

Three (3) Pre-hearing sessions with the
full Panel x $1,200 =$3,600.00
Pre-hearing conferences:

July 12, 2001	1 session
September 17, 2001	1 session
September 26, 2001	1 session

Seventeen (17) Hearing sessions x $1,200 =$20,400.00
Hearing Dates

January 14, 2002	2 sessions
January 15, 2002	2 sessions
January 16, 2002	3 sessions
January 17, 2002	3 sessions
January 18, 2002	2 sessions
January 21, 2002	2 sessions
January 22, 2002	3 sessions

Total Forum Fees =$24,900.00

The Panel has assessed the forum fees incurred in this arbitration as follows: one half ($12,450) to Merrill Lynch and one half ($12,450) to First Union.

FEE SUMMARY

Claimant Merrill Lynch is solely liable for:		
Initial Filing Fee	=$	500.00
Member Fees	=$	3,800.00
Injunctive Relief Surcharge	=$	2,500.00
Forum Fees	=$	12,450.00
Total Fees	=$	19,250.00
Less payments	=$	7,200.00
Balance Due to NASD Dispute Resolution, Inc.	=$	12,050.00

Respondents Berry and Spencer are jointly and severally liable for:		
Counterclaim/Third Party Claim filing fee	=$	500.00
Total Fees	=$	500.00
Less payments	=$	1,700.00
Refund Due from NASD Dispute Resolution, Inc.	=$	1,200.00

Respondent First Union is solely liable for:		
Member Fees	=$	3,800.00
Forum Fees	=$	12,450.00
Total Fees	=$	16,250.00
Less payments	=$	3,200.00
Balance Due to NASD Dispute Resolution, Inc.	=$	13,050.00

All balances are due to NASD Dispute Resolution, Inc.

ARBITRATION PANEL

Daniel G. Zeiser, JD - *Public Arbitrator, Chairperson*

James Dale Ellis, CPA - *Public Arbitrator*

Steven C. Bender, CPA - *Non-Public Arbitrator*

/s/ 2/28/02

Daniel G. Zeiser, JD Signature Date
Chairperson

/s/ 2/28/02

James Dale Ellis CPA Signature Date
Public Arbitrator

/s/ 2/28/02

Steven C. Bender, CPA Signature Date
Non-Public Arbitrator

_____

Date of Service (For NASD-Dispute Resolution office use only)

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 02-4282

[Received March 11, 2004]

MERRILL LYNCH, PIERCE, FENNER AND SMITH, Plaintiff-Appellee,	)
v.	)
ROBERT W. BERRY, ET AL., Defendants-Appellants.	)

PETITION FOR REHEARING *EN BANC*

STATEMENT PURSUANT TO FRAP 35(B)

Appellants Robert W. Berry and Diane L. Spencer ("Berry/Spencer") request rehearing en banc because the Opinion entered February 26, 2004 (the "Opinion")(copy attached) involves one or more questions of exceptional importance. The Opinion conflicts with the authoritative decisions of every other United States Court of Appeals that has addressed the issue of whether discovery and a hearing are required on a motion to vacate an arbitration award,

where a party has presented evidence of an arbitrator's active concealment of material conflicts.

The Court of Appeals for the Eleventh Circuit, the only other Circuit Court that has ruled directly on the issue, recently reversed a denial of a motion to vacate on the ground that the district court had failed to permit discovery and to conduct an evidentiary hearing. University Commons-Urbana, Ltd. v. Universal Constructors Inc., 304 F.3d 1331 (11th Cir. 2002)("University Commons").

Here, the District Court denied Berry/Spencer's motion to vacate, without ruling on Berry/Spencer's request for discovery and a hearing. The failure of the District Court to allow discovery was raised by Berry/Spencer in their Brief as the first of two issues for review. This Court, in the Opinion, affirmed the District Court and denied the appeal based upon this Court's findings that Berry/Spencer had inadequate proof to sustain the appeal, without addressing at all the failure of the District Court to permit discovery. By denying, sub silencio, Berry/Spencer the opportunity for discovery while at the same time denying the appeal for lack of evidence, the Opinion conflicts with the Eleventh Circuit's decision in University Commons, warranting rehearing en banc.

Proceedings Below

Berry/Spencer appealed from the October 31, 2002, Order (the "Order")(R.44, Order, Apx. 24) of the United States District Court for the Northern District of Ohio, Eastern Division (Hon. James S. Gwin). The Order denied Berry/Spencer's motion to vacate an arbitration award (the "Award"). (R.39, Motion, Bravo Aff't, at Exh. A, Apx. 71) The Award was rendered on March 4, 2002 in an arbitration held under the auspices of NASD Dispute Resolution, Inc.

("NASD-DR"), captioned Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Robert W. Berry, Diane L. Spencer and First Union Securities Inc. v. John Inhouse (NASD Case No. 01-02983)(the "Arbitration").

This case was commenced in the District Court by Merrill Lynch on June 5, 2001. Merrill Lynch sought, among other things, a temporary restraining order and preliminary injunction, enjoining Berry/Spencer from soliciting clients of Merrill Lynch, pending arbitration. On June 5, 2001, Merrill Lynch also filed for arbitration seeking similar relief. On June 6, 2001, the District Court granted the TRO requested by Merrill Lynch. (R.9, Order, Apx. 38) On June 22, 2001, the parties entered into a consent preliminary injunction (R.38, Stipulated Order, Apx. 42), providing, among other things, for the dispute between the parties to proceed to arbitration at NASD-DR. Thereafter, the case was stayed in the District Court pending the Arbitration.

In the Arbitration, Berry/Spencer asserted various defenses and counterclaims, including but not limited to, age discrimination, retaliatory discharge and defamation. (R.39, Motion, Bravo Aff't at Exh. E, Apx. 91) On March 4, 2002, the arbitrators rendered their Award, granting Merrill Lynch's claims, and denying all Berry/Spencer's counterclaims, except for a single counterclaim by Berry for defamation. (R.39, Motion, Bravo Aff't at Exh. A, Apx. 71)

On July 19, 2002, Berry/Spencer's counsel first learned of a possible undisclosed conflict on the part of the Chairman of the arbitration panel, Daniel G. Zeiser ("Zeiser"). (R.39, Motion, Jacobson Aff't, at ¶ 4, Apx. 151) On August 9, 2002, Berry/Spencer's counsel learned of an additional undisclosed conflict by Zeiser. (R.39, Motion, Jacobson Aff't, at ¶ 7, Apx. 152)

On October 2, 2002, Berry/Spencer filed a motion to vacate the Award, and to take discovery and present evidence at a hearing with regard to issues raised by the motion to vacate. (R.39, Motion, Apx. 43) On October 31, 2002, in the Order appealed from, the District Court denied the motion to vacate, without addressing that aspect of the motion as sought discovery and hearing.

Proceedings In This Court

Berry Spencer timely filed a notice of appeal from the Order appealed from, and perfected their appeal. On this appeal, Berry/Spencer presented two issues for review:

> "1. Where a party has presented evidence of an arbitrator's active concealment of material conflicts, should a district court permit discovery and conduct an evidentiary hearing as to the arbitrator's conflicts and concealment of conflicts, where a party has moved to vacate an arbitration award pursuant to 9 U.S.C. § 10(a)(2)("there was evident partiality or corruption in the arbitrators, or either of them")?
>
> 2. May a district court equitably toll the three-month time limitation contained in 9 U.S.C. § 12, where an arbitrator actively concealed material conflicts such that the conflicts were not discovered until more than three months after the rendering of the arbitration award?" (See Berry/Spencer Final Brief, at 2)

In the Opinion, the Court examined, without deciding, Issue No. 2 (the concurring Justice ruled in the affirmative as to Issue No. 2). The Court, without ruling on whether equitable tolling might apply to the three-month time limitation contained in 9 U.S.C. § 12, found that

Berry/Spencer had failed to present sufficient evidence warranting equitable tolling. The Court, however, did not address Issue No. 1 (the lack of discovery), which went to the heart of why Berry/Spencer lacked more detailed proof as to Zeiser's conflicts.

STATEMENT OF THE FACTS

Zeiser was appointed to the panel of three arbitrators in or about late June 2001. (R.39, Motion, Bravo Aff't at ¶ 3, Apx. 67) Zeiser was the Chairman of the arbitration panel, was responsible for all pre-hearing discovery rulings, and took the lead among the arbitrators in many rulings during the hearings. (Id.) In connection with his appointment as Chairman of the arbitration panel, Zeiser made certain disclosure statements, including the following disclosure regarding Zeiser's prior interaction with the law firm acting as co-counsel for Berry/Spencer, Ulmer & Berne LLP:

> "While employed by KeyBank National Association, Ulmer & Berne was one of the law firms KeyBank used in securities matters. While I did not work with Matthew Morelli or Ken Bravo, I did work with Michael Unger on two or three NASD disputes." (R.39, Motion, Bravo Aff't at Exh. B, Apx. 79)

On or about January 9, 2002, prior to the commencement of the evidentiary hearings in the Arbitration, Zeiser further disclosed that he was acquainted with a witness in the case, a lawyer in Cleveland. (R.39, Motion, Bravo Aff't at ¶ 4 and Exh. C, Apx. 67, 86)

At the commencement of the evidentiary hearings on January 14, 2002, Zeiser made a disclosure similar to the disclosure made in June 2001, to the effect that Zeiser had

worked with Ulmer & Berne LLP when Zeiser was employed at KeyBank. (R.39, Motion, Bravo Aff't at ¶ 5 and Exh. D, Apx. 67, 90)

In the Arbitration, Berry/Spencer asserted counterclaims, among others, for age discrimination. (R.39, Motion, Bravo Aff't at ¶6 and Exh. E, Apx. 68, 91) Under the NASD-DR disclosure requirements for arbitrators, Zeiser was required to disclose that a discrimination claim had been asserted against him. (R.39, Motion, Bravo Aff't at Exh. B, Apx. 79) At no time before, during, or after, the evidentiary hearings did Zeiser disclose that Zeiser himself had been named as a defendant in a discrimination claim. (R.39, Motion, Bravo Aff't at ¶ 7Apx. 68; R.39, Motion, Jacobson Aff't at ¶ 5, Apx. 151)

Berry/Spencer did not learn that Zeiser himself had been named as a defendant in a discrimination claim until July 19, 2002, when Berry/Spencer's counsel received a copy of a New York Stock Exchange, Inc. ("NYSE") disclosure statement issued by Zeiser unrelated to the Arbitration. (R.39, Motion, Jacobson Aff't at ¶ 4, and at Exh. Apx. 151, 153; R.39, Motion, Bravo Aff't at ¶ 8, Apx. 68) Zeiser's NYSE disclosure statement disclosed that Zeiser himself had been named as a defendant in a discrimination claim. (Id.)

The Arbitration involved substantial counterclaims of discrimination brought by Berry/Spencer, and it certainly would have been material to know that the Chairman of the panel was, or recently had been, a defendant in a discrimination suit. Had Zeiser disclosed that he had been a defendant in a discrimination claim, Berry/Spencer would have requested that Zeiser be removed from the arbitration panel. (R.39, Motion, Bravo Aff't at ¶ 7, Apx. 68; R.39, Motion, Jacobson Aff't at ¶ 5, Apx. 151)

After receiving Zeiser's NYSE disclosure statement on July 19, 2002, Berry/Spencer's counsel forwarded a copy to his co-counsel at Ulmer & Berne LLP. Berry/Spencer's counsel also began to investigate public sources of information in an attempt to find some case-reference to the discrimination claim in which Zeiser had been a defendant. (R.39, Motion, Jacobson Aff't at ¶ 6, Apx. 151)

On August 9, 2002, Berry/Spencer's counsel checked the public website for the Cuyahoga County Court of Common Pleas, which permits name searches. By doing a name search for Zeiser, Berry/Spencer's counsel was able to obtain a printout of the docket sheet and party information sheet in a case captioned Marvin J. Feldman et al. v. Ameritech et al. (the "Common Pleas Lawsuit"). (R.39, Motion, Jacobson Aff't at ¶ 7, and Exh. B, Apx. 152, 156). As reflected therein, Zeiser was a named party plaintiff in the Common Pleas Lawsuit, which commenced in July 2000 and ended in July 2001. (Id.) One of the defendants in the Common Pleas Lawsuit was being defended by Edward P. Simms, Esq., an associate attorney at Ulmer & Berne LLP. (Id.; R.39, Motion, Simms Aff't at ¶ 2, Apx. 159) Zeiser himself participated in various aspects of the Common Pleas Lawsuit. (R.39, Motion, Simms Aff't at ¶ 2, Apx. 159)

Under NASD-DR arbitrator disclosure guidelines an arbitrator who has a conflict as to the counsel in the arbitration must disclose such conflict. (R.39, Motion, Bravo Aff't at Exh. B, Apx. 79) At no time before, during, or after, the evidentiary hearings did Zeiser disclose that Zeiser himself had been a party plaintiff in a case defended by an associate attorney at the law firm acting as co-counsel for Berry/Spencer in the Arbitration, Ulmer & Berne LLP. Had Zeiser disclosed this information, Berry/Spencer would have requested that Zeiser be removed from the panel of arbitrators

because of the obvious conflict of interest. (R.39, Motion, Bravo Aff't at ¶ 10, Apx. 68; R.39, Motion, Jacobson Aff't at ¶ 8, Apx. 152) The attorney at Ulmer & Berne LLP handling the Arbitration for Berry/Spencer did not know, and could not have known in the exercise of reasonable diligence, that an associate in a different group at his firm was defending a case brought by Zeiser. (R.39, Motion, Bravo Aff't at ¶ 11, Apx. 69)

As of the date Berry/Spencer filed the motion to vacate, Berry/Spencer had been unable to discover information as to the particulars of the discrimination claim in which Zeiser was a defendant. (R.39, Motion, Bravo Aff't at ¶9 and Exhs. F, G, H, Apx. 68, 147, 148, 149) Berry/Spencer's efforts to discover this information continued from the moment their counsel received Zeiser's NYSE disclosure statement on July 19, 2002, without success. (Id.)

ARGUMENT

A. The District Court Erred By Failing To Permit Discovery And To Hold An Evidentiary Hearing

An arbitration award may be vacated under the Federal Arbitration Act where "there was evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). See, e.g., Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 205 F.3d 906 (6th Cir. 2000)(Federal Arbitration Act is exclusive remedy for contesting bias of arbitrator).

As the United States Supreme Court has noted, courts "should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former

have completely free rein to decide the law as well as the facts and are not subject to appellate review." Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968). An arbitrator is required to disclose "any dealing that might create an impression of possible bias," and it does not matter [w]hether the arbitrator's decision itself is faulty..." Woods v. Saturn Distrib. Corp., 78 F.3d 424, 427 (9th Cir. 1996).

A fact pattern very similar to Zeiser's non-disclosure was presented in the recent ruling by the 11th Circuit in University Commons, supra. In University Commons, the parties placed in issue whether an arbitrator had made proper disclosure of the arbitrator's relationship with one of the counsel in the arbitration, with whom the arbitrator was co-defending an unrelated case. After initially allowing discovery, the District Court reversed itself, and ordered that there be no discovery taken as to the arbitrator's conflicts. The Court of Appeals reversed, finding that discovery and an evidentiary hearing were required.

The 11th Circuit first observed the nature of the alleged conflict, that the arbitrator was counsel in a case in which one of the parties' arbitration counsel represented a co-defendant. The 11th Circuit found that "[i]f this allegation is true, then [the arbitrator], at least, would have appeared to be biased" in favor of the party in the arbitration represented by such co-counsel. 304 F.3d at 1340. The Court held that "serving as the decision-maker in one action in which a colleague in another action represents a party clearly poses the possibility of bias, and thus represents a potential conflict that a reasonable person would easily recognize." 304 F.3d at 1341. The Court went on to find that "[a]t this point, the district court should have plunged headlong into evidentiary fact-finding," rather than a summary confirmation of the

arbitration award. Id. "Of course," the Court further noted, "discovery would have been needed as to all of these issues." 304 F.3d at 1342.

Here, the facts supporting the need for discovery and an evidentiary hearing are even more impressive than in University Commons. Here, the conflict was not that Zeiser was counsel in another case opposite Berry/Spencer's counsel. Rather, Zeiser was *a party* in a lawsuit opposite Berry/Spencer's counsel.

Moreover, Zeiser failed to disclose that he was a party-defendant in a discrimination claim, even though the NASD-DR disclosure form clearly required the disclosure of such information. (R.39, Motion, Bravo Aff't at Exh. B, Apx. 79) Even if the NASD-DR disclosure form did not so require, under the University Commons standard, having an arbitrator (the Chairman of the panel no less) in a discrimination arbitration who himself had been a defendant in a discrimination claim clearly is information that a reasonable person would consider relevant in determining whether the arbitrator was biased against discrimination claimants such as Berry/Spencer. Discovery was particularly necessary on this point, because Berry/Spencer were unable to ascertain the exact parameters of Zeiser's defense of his own discrimination case.

There were substantial facts that were not fully known, that were critical to the District Court's determination. For example, because discovery had not taken place, Berry/Spencer did not know Zeiser's explanation for why he failed to disclose a clear conflict with the law firm representing Berry/Spencer, and whether Merrill Lynch was aware of this conflict.

Zeiser's failure to disclose this contemporaneous conflict is particularly baffling because Zeiser went out of his way on two separate occasions to make disclosure as to positive interactions with Berry/Spencer' counsel several years earlier. It is hard to understand how Zeiser could have remembered to disclose a positive contact with Berry/Spencer's counsel that was several years old, but forgotten to disclose a direct and recent conflict.

Similarly, under the NASD-DR disclosure requirements for arbitrators, Zeiser was required to disclose that a discrimination claim had been asserted against him. (R.39, Motion, Bravo Aff't at Exh. B, Apx. 79) The details of that discrimination claim, and Zeiser's explanation for the non-disclosure, however, were not known as of the filing of the motion to vacate, despite substantial efforts by Berry/Spencer's counsel to investigate.

Zeiser's non-disclosures went to the heart of the integrity of the Arbitration. Under NASD-DR arbitrator disclosure guidelines (R.39, Motion, Bravo Aff't at Exh. B, Apx. 79), an arbitrator who has a conflict as to the counsel in the arbitration or the subject matter of the arbitration, must disclose such conflict. Here, Zeiser had a conflict as to both the counsel and the subject matter, and disclosed neither. To the contrary, Zeiser went out of his way on two separate occasions to disclose a years-old positive interaction with Ulmer & Berne LLP, thereby lulling Berry/Spencer' into a false sense of security as to Zeiser. (R.39, Motion, Bravo Aff't at pg. 12, Apx. 69) Because of the difficulty of vacating an arbitration award, the integrity of arbitrators is paramount. It is for this reason that the 11th Circuit, in University Commons, required that discovery and an evidentiary hearing be held as to an arbitrator's failure to disclose conflicts of interest.

The present case is to be distinguished from the facts presented in Nationwide Mutual Ins. Co. v. Home Ins. Co., supra. In that case, the parties were aware of the facts giving rise to the claim of bias during the proceedings, and "stipulated that they waived subsequent objections as to bias or partiality stemming from matters disclosed...." 278 F.3d at 626. In that context, this Court held that it was not an abuse of discretion for the district court to deny discovery on this issue. 278 F.3d at 628. Here, by contrast, Berry/Spencer allege that Zeiser's conflicts were undisclosed, and incapable of full disclosure absent discovery in support of the motion to vacate. The District Court here never addressed this issue at all.

Based on the facts known about Zeiser's failure to disclose material conflicts in direct violation of NASD-DR disclosure requirements, the District Court had grounds to vacate the Award. To the extent the District Court deemed the evidence insufficient in and of itself to vacate the Award, there were sufficient facts presented to require discovery and an evidentiary hearing.

B. THE OPINION CONFLICTS WITH THE ELEVENTH CIRCUIT HOLDING IN UNIVERSITY COMMONS

As demonstrated above, the were numerous factual issues warranting discovery. The failure of the District Court to permit discovery was the primary focus of this appeal. Yet, this Court, in the Opinion, did not address the failure of the District Court to permit discovery. Rather, this Court examined the facts and concluded that Berry/Spencer had not met their burden of proving facts sufficient to demonstrate equitable tolling, assuming *arguendo* that equitable tolling was applicable. By implicitly denying Berry/Spencer's appeal

as to the lack of discovery, the Opinion directly conflicts with the Eleventh Circuit's decision in University Commons.

We respectfully suggest that this Court should not have ruled on the issue of whether Berry/Spencer had proven their case to vacate the Award, without first ruling on whether Berry/Spencer improperly were denied discovery in the District Court. By so doing, this Court put Berry/Spencer in the impossible position of proving facts that were denied to Berry/Spencer contrary to the Eleventh Circuit's decision in University Commons. Given the contradiction between the denial of discovery to Berry/Spencer here and the Eleventh Circuit's decision in University Commons, rehearing en banc is warranted, and upon rehearing, this Court should reverse the Order appealed from and remand for further proceedings.

CONCLUSION

The Court should grant rehearing en banc, and upon rehearing, the Order appealed from should be reversed, and this case should be remanded to the District Court for discovery and evidentiary hearings.

Respectfully Submitted,

/s/_____

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-and-
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Matthew J. Morelli, Esq. (0063738)
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Attorneys for Robert W. Berry
and Diane L. Spencer

CERTIFICATE OF COMPLIANCE

Pursuant to 6th Cir.R.32 (a)(7)(c), the undersigned certifies this Petition for Rehearing En Banc complies with the type-volume limitations of 6th Cir.R.32(a)(7)(B) and hereby certifies that the foregoing proof brief contains 3238 words. The brief was prepared in Microsoft Word 2000, Times New Roman 14 pt. font.

/s/
John D. Gallagher

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Petition for Rehearing En Banc has been served, via ordinary U.S. Mail, upon:

Stephen M. Bales
Ziegler, Metzger & Miller
925 Euclid Avenue
Suite 2020 Huntington Bldg.
Cleveland, OH 44115-1441

Michael J. Fortunato
David F. McComb
Rubin & Associates
10 S. Leopard Road
Suite 202 MCS Bldg.
Paoli, PA 19301

on this 11th day of March, 2004

/s/_____
John D. Gallagher

ATTACHMENT

OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS, FILED FEBRUARY 26, 2004

SEE APPENDIX B at 3a

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5.01 CV 1357

MERRILL LYNCH, PIERCE, FENNER,)
& SMITH INCORPORATED)
Plaintiff,)
)
-vs-)
)
ROBERT W. BERRY, et al.,)
Defendants.)
)

BEFORE: JUDGE JAMES S. GWIN

MOTION TO VACATE ARBITRATION AWARD

Defendants Robert W. Berry and Diane L. Spencer (the "Moving Parties"), move that this Court vacate an arbitration award rendered in the matter of Merrill Lynch, Pierce, Fenner & Smith. Inc. v. Robert W. Berry, Diane L. Spencer and First Union Securities Inc. v. John Inhouse (NASD Case No. 01-02983)(the "Arbitration"), on the ground of evident partiality of the Chairman of the arbitration panel, Daniel G. Zeiser ("Zeiser").

As reasons therefore, and as set forth more fully in the accompanying Memorandum of Law and Affidavits of Kenneth A. Bravo, William A. Jacobson, and Edward P. Simms, Zeiser failed to disclose, and actively concealed, two fundamental conflicts of interest. First, Zeiser failed to disclose that he was a named party plaintiff in a litigation in which another attorney at the undersigned counsel's firm was representing a defendant. Second, Zeiser failed to disclose that he had been named as a defendant in an employment discrimination suit even though the Arbitration involved substantial claims of employment discrimination asserted by the Moving Parties.

The Moving Parties further request that the court hold an evidentiary hearing, as required by University Commons-Urbana, Ltd. V. Universal Constructors Inc., 2002 WL 31042267 (11th Cir. Sept. 13, 2002), after the Moving Parties have had a reasonable opportunity to take discovery as to matters relevant to this motion to vacate. The Moving Parties anticipate that discovery could be completed within 90 days of the commencement of discovery.

Respectfully Submitted,
/s/

Kenneth A. Bravo (0014274)
Matthew J. Morelli (0063738)
ULMER & BERNE LLP
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Attorneys for Robert W. Berry
and Diane L. Spencer

Of Counsel:

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CERTIFICATION OF SERVICE

I hereby certify that on October 2, 2002 Defendants' Motion to Vacate Arbitration Award was filed electronically. Notice of the filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access the filing through the Courts system.

/s/ Kenneth A. Bravo
Kenneth A. Bravo (0014274)

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5.01 CV 1357

MERRILL LYNCH, PIERCE, FENNER, & SMITH INCORPORATED Plaintiff,	)
-vs-	)
ROBERT W. BERRY, et al., Defendants.	)

BEFORE: JUDGE JAMES S. GWIN

AFFIDAVIT OF KENNETH A. BRAVO

STATE OF OHIO)
) .ss:
CUYAHOGA COUNTY)

KENNETH A. BRAVO, being duly sworn, deposes and says:

1. I am an attorney admitted to the Bar of the State of Ohio. I am a partner in the litigation department of the law firm of Ulmer & Berne LLP.

2. I served as co-counsel of record for Robert W. Berry ("Berry") and Diane L. Spencer ("Spencer")(collectively, the "Moving Parties") in the arbitration captioned Merrill Lynch. Pierce. Fenner & Smith. Inc. v. Robert W. Berry, Diane L. .Spencer and First Union Securities Inc. v. John Inhouse (NASD Case No. 01-02983)(the "Arbitration"), held under the auspices of the National Association of Securities Dealers, Inc. (the "NASD"), as directed by this Court in its Orders, dated June 6, 2001, and June 22, 2001. A copy of the Award in the Arbitration is annexed hereto as Exhibit A.

3. In connection with the Arbitration, Daniel G. Zeiser ("Zeiser") was appointed as the Chairman of the panel of three arbitrators in or about late June 2001. Zeiser was the Chairman of the arbitration panel, was responsible for all pro-hearing discovery rulings, and took the lead among the arbitrators in many rulings during the hearings. On July 10, 2001, my office received a facsimile from the NASD enclosing certain disclosure statements by Zeiser in connection with the Arbitration, including the following disclosure.

> "While employed by KeyBank National Association, Ulmer & Berne was one of the law firms KeyBank used in securities matters. While I did not work with Matthew Morelli or Ken Bravo, I did work with Michael Unger on two or three NASD disputes."

A copy of this disclosure statement is annexed hereto as Exhibit B.

4. On January 9, 2002, my office received a facsimile from the NASD, a copy of which is annexed as Exhibit C, in which Zeiser disclosed that he was acquainted with a witness in the case, a lawyer in Cleveland.

5. At the commencement of the evidentiary hearings on January 14, 2002, Zeiser made a disclosure similar to the disclosure contained in Exhibit B, to the effect that Zeiser had worked with my firm when Zeiser was employed at KeyBank. The relevant pages from the transcript (pages 3-4) are annexed as Exhibit D hereto.

6. The Arbitration involved substantial counterclaims of discrimination and retaliatory discharge by the Moving Parties. A copy of the Answer and Counterclaims (without exhibits) of the Moving Parties is annexed hereto as Exhibit E.

7. At no time before, during, or after, the evidentiary hearings did Zeiser disclose that Zeiser himself had been named as a defendant in a discrimination suit. Had any disclosure been made of such information, the Moving Parties would have challenged Zeiser's appointment to the panel of arbitrators, since having an arbitrator in a discrimination arbitration who himself had been a defendant in a discrimination lawsuit creates both the appearance of, and actual, bias.

8. I did not learn that Zeiser himself had been named as a defendant in a discrimination suit until on or about July 19, 2002, when such information was brought to my attention by my co-counsel in the Arbitration, William A. Jacobson, Esq.

9. After learning that Zeiser had been a party to a discrimination suit, I sent Freedom of Information Act requests to the applicable state and federal agencies. (Exhibits F and G) I have received a response from the EEOC (Exhibit H), but have not received a response from the state agency. As of this date. we have been unable to discover information as to the particulars of the discrimination suit in which Zeiser

was a defendant.

10. Additionally, at no time before, during, or after, the evidentiary hearings did Zeiser disclose that Zeiser was a party plaintiff in a case handled by another lawyer at my firm. Had Zeiser disclosed this information, the Moving Parties would have requested that Zeiser be removed from the panel of arbitrators because of the obvious conflict of interest.

11. My firm has approximately 137 attorneys, approximately 100 of whom practice in Cleveland. Of these 100 attorneys, approximately 59 devote all or a substantial portion of their practice to litigation and/or arbitration. In addition, the firm has approximately 28 attorneys in offices other than Cleveland who devote all or a substantial portion of their practice to litigation and/or arbitration. It is not the practice of my firm, or of me, to run firm-wide conflicts check regarding arbitrators appointed, or to be appointed, in arbitrations. It is our practice, when we receive a list of potential arbitrators from the NASD, to circulate a copy of that list to those attorneys in our "broker-dealer sub-group," which consists of those attorneys who handle arbitrations in this area. Because this case involved a request for injunctive relief, we did not receive a list of potential arbitrators containing Zeiser's name, which would have been the normal practice in a case which did not seek such relief. Rather, the NASD simply named Zeiser to be the chairperson of the panel in this case. Because I was aware of who Zeiser was (having seen his name circulated on other NASD lists) there was no reason for me to make any inquiry within the firm in order to learn about his background. Furthermore, had I made an inquiry to the "broker-dealer sub-group," that inquiry would not have gone to my associate Edward Simms since he was not, and is not, a member of that group.

12. To the contrary, I respected the fact that Zeiser made disclosure of his experience with my firm while Zeiser was at KeyBank (see paragraph 3 above), which was the proper course of conduct for an arbitrator in a case. I did not find out that Zeiser was a party plaintiff in a lawsuit being defended by Edward Simms of my firm, until on or about August 9, 2002, when such information was brought to my attention by Mr. Jacobson.

/s/_____
Kenneth A. Bravo

Sworn to before me this
2nd day of October, 2002

/s/_____
Notary Public

[See Appendix D at 17a, Arbitration Award]

NASD
DISPUTE RESOLUTION
An NASD Company

July 10, 2001

Matthew J. Morelli, Esq.
Ulmer & Berne
1300 East Ninth Street
Penton Media Building, Suite 900
Cleveland, OH 44114

Subject: NASD-DR Arbitration Number 01-02983
Merrill Lynch, Pierce, Fenner & Smith Inc.
v. Robert W. Berry. Diane L. Spencer and First Union Securities, Inc.

Dear Mr. Morelli:

Arbitrator Daniel G. Zeiser, J.D discloses that:

< see attached documents >

The arbitrator affirmatively states that the foregoing facts will not affect his/her ability to be fair and impartial in the decision of this matter. In the interest of full disclosure, the arbitrator wishes to inform the parties of these facts.

Very truly yours,
/s/_____
Jeffrey Dean
Staff Attorney
312-899-4440

JXD:MAR:LC.54H
wnb:7/00

RECIPIENTS:

David F. McComb, Esq., Merrill Lynch Pierce Fenner & Smith Inc
Rubin & Associates, P.C., MCS Building, 10 South Leopard Road, Paoli, PA 19301

Matthew J. Morelli, Esq., Robert W. Berry
Ulmer & Berne, 1300 East Ninth Strut, Penton Media Building, Suite 900, Cleveland OH 44114

Matthew J. Morelli, Esq., Diane L. Spencer
Ulmer & Berne, 1300 East Ninth Street, Penton Media Building, Suite 900, Cleveland, OH 44114

William H. Falin, Esq., First Union Securities, Inc.
Moscarino & Treu, 1422 Euclid Avenue. The Hanna Building, Suite 630, Cleveland, OH 44115

NASD Dispute Resolution, Inc,

In the Matter of the Arbitration Between 01-02983

Merrill Lynch Pierce Fenner & Smith Inc
Claimant(s)

vs.

Robert W. Berry
Diane L. Spencer
First Union Securities, Inc.
Respondent(s)

Oath
Of
Arbitrator

Having been selected as an arbitrator to consider the matter in controversy between the above-captioned parties, I solemnly swear or affirm that I am not an employer of, employed by, or related by blood or marriage to any of the parties or witnesses whose names have been disclosed to me; that I have no direct or indirect interest in this matter; I know of no existing or past financial, business, professional, family or social relationship which would impair me from performing my duties; and that I will decide the controversy in a fair manner and render a just award.

I have carefully read, reviewed, and considered the NASD-DR's Temporary and Permanent Arbitrator Disqualification Criteria. I swear or affirm that, based on the criteria, I am not temporarily or permanently disqualified from being an NASD arbitrator.

I have reviewed and completed the *Arbitrator Disclosure Checklist* enclosed, and certify that (check one):

____ I've nothing to disclose.
__✓__ I made disclosures on the Arbitrator Disclosure Checklist.

I have carefully read, reviewed, and considered my *Arbitrator Disclosure Report and certify that* (check one):

__✓__ I have nothing additional to disclose. My *Arbitrator Disclosure Report* is accurate, current, and up to date.
____ I have noted changes or corrections on the Report.

/s/_____
Daniel G. Zeiser, JD

STATE OF OHIO ss.:
COUNTY OF CUYAHOGA

On this 28th day of June 2001, before me personally appeared Daniel G. Zeiser, J.D. to me known before me to be the individual described in and who executed the foregoing instrument and s/he duly acknowledged to me that s/he executed the same.

/s/_____
LORI M. GALLO, Attorney at Law
Notary Public - State of Ohio
My commission has no expiration date
Section 147.03 R.C.

ARBITRATOR DISCLOSURE CHECKLIST

The Arbitrator Disclosure Checklist is sent to the arbitrator's as part of the Oath of Arbitrator. It not only provides a reminder to the arbitrators to consider all possible disclosures, but also requires a complete explanation of any possible conflict to the parties.

Please indicate your response to each of the questions listed below by checking the appropriate box. *Please check "yes" or "no" to each question.* Provide a full explanation to any question(s) to which you provided a "yes" response. All affirmative responses and explanations will be sent to the parties.

1. Do you presently represent any person in a proceeding adverse to any party to the arbitration? NO

2. Have you represented any other person against any party to the arbitration in the past five years? NO

3. Have you been retained to assist any party as an expert or otherwise in a proceeding involving any party to the arbitration in the last five years? NO

4. Have you had any professional or social relationships with counsel for any party in this proceeding or the firm for whom they work? YES

5. Have you had any professional or social relationships with any party in this proceeding or the firm for whom they work? NO

6. Have you had any professional or social relationships with any relative of any party, counsel, or identified witness in this proceeding? NO

7. Have you ever served as an arbitrator in a proceeding in which any of the identified witness or named parties gave testimony? NO

8. Have you or any member of your family maintained an account individually, jointly or beneficially with a brokerage firm named in this proceeding? NO

9. Have you ever, as a party to an arbitration or litigation, named a brokerage firm, or been named by a brokerage firm in any civil law suit or arbitration proceeding? NO

10. Have you ever been named as a party by an investor in any civil lawsuit or arbitration proceeding? NO

11. Are you a member of any securities-related organization (e.g., Securities Industry Association) or organization of claimants or attorneys who periodically represent investors in suits against brokerage firms (e.g., Public Investors Arbitration Bar Association)? NO

12. Have any of your relatives named a brokerage firm, or been named by a brokerage firm in any civil lawsuit or arbitration? NO

13. Have you or a member of your immediate family invested in or held any of the securities that are subject of this dispute during the time periods in question? NO

14. Have you, any member of your immediate family, close social or business associate, been involved in the last five years in a dispute involving the same subject matter as contained in the case to which you are assigned? NO

15. Has any member of your immediate family or household been employed by a brokerage firm? NO

16. Have you had any social or professional relationship with any other arbitrator assigned to this case? NO

17. Has your conduct been an issue in an arbitration or litigation proceeding (other than a proceeding in which you served as an arbitrator)? For example, if your conduct as a registered representative or manager was an issue in a case, but only the broker-dealer was named as a party, your response should be "yes." NO

18. Do you have any disclosures on your record with the Central Registration Depository ("CRD")[1] which are not reflected on your disclosure report? NO

Please attach additional sheet(s) to explain and clarify any "yes" answers to the above questions.

While employed by KeyBank National Association, Ulmer & Berne was one of the law firms KeyBank used in securities

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[1] CRD is an automated, electronic web system, which NASD Regulation, Inc. uses to maintain the qualification, employment and disclosure histories of member firms' registered securities employees.

matters. While I did not work with Matthew Morelli or Ken Bravo, I did work with Michael Unger on two or three NASD disputes.

NASD
DISPUTE RESOLUTION
An NASD Company

January 9, 2002

Ken Bravo, Esq.
Ulmer & Berne
1300 East Ninth Street
Penton Media Building, Suite 900
Cleveland, OH 44114

Subject: NASD-DR Arbitration Number 01-O2983
Merrill Lynch, Pierce, Fesner & Smith Inc. v. Robert W. Berry, Diane L. Spencer and First Union v. John Inhouse

Dear Mr. Bravo:

Arbitrator Daniel G. Zeiser, J.D discloses that:

< see attached documents >

The arbitrator affirmatively states that the foregoing facts will not affect his/her ability to be fair and impartial in the decision of this matter. In the interest of full disclosure, the arbitrator wishes to inform the parties of these facts.

Very truly yours,

Jeffrey Dean
Staff Attorney
312-899-4440

JXD:MAR:LC54H

wnb:7/00

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January 8, 2002

VIA FACSIMILE ONLY 312-236-939

Jeffrey Dean, Esq.
Staff Attorney
NASD Dispute Resolution, Inc.
10 S. LaSalle Street, Suite 1110
Chicago, Illinois 60603-I 002

RE: NASD-DR Arbitration No. 01-O2983
Merrill Lynch, Pierce, Fenner & Smith Inc. v. Robert W. Berry, Diane L. Spencer and First Union Securities, Inc. v. John Inhouse III

Dear Jeffrey:

I received the Witness Lists filed by the parties in the above matter. There is one potential conflict. Berry/Spencer's list includes the name Scott Kahn. I know an attorney in Cleveland by the name of Scott Kahn. I do not know if the Scott Kahn listed is the one I know. Nor do I believe there to be a conflict. However, I believe I should disclose the potential conflict.

The Scott Kahn I know is a partner in the Cleveland lawfirm of McIntyre Kahn Kruse & Gillornbardo Co., L.P,A, I know Scott because he is the cousin of a friend of mine. I have not had any cases with him; he is primarily a bankruptcy lawyer. Nor do we socialize. My oldest son and one of his sons played soccer on opposing recreational teams several years ago. But I mainly know him through my friend, his cousin. My friend has since moved to another suburb of Cleveland and we rarely socialize any longer. Occasionally, I see Scott at one of the courthouses or while walking

downtown. As I stated, I do not believe there to be a conflict, but if the Scott Kahn listed as a witness is the same one, we would recognize each other and exchange pleasantries and the parties would know we had some relationship.

Thank you for your attention to this. If the parties have a problem with this, please let me know.

Very truly yours,
/s/_____
Daniel G. Zeiser

In Re: Merrill Lynch, Pierce, Fenner and Smith, Inc., et al.
NASD ARBITRATION PROCEEDINGS

VOLUME I January 14, 2002

[Page 2]
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ARBITRATION PANEL MEMBERS:
Daniel G. Zeiser, Chairman
Steven C. Bender, Industry Arbitrator
James Ellis, Industry Arbitrator
ALSO PRESENT:
Robert T. Wright
John I. Inhouse, III
Robert W. Berry
Diane L. Spencer

[Page 3]

MR. ZEISER: We're here for an NASD Arbitration Case 01-02983, Merrill Lynch, Pierce, Fenner and Smith, Inc., versus Robert W. Berry, Diane L. Spencer and First Union Securities, Inc., versus John Inhouse, III.

I have some preliminary stuff to go through, so bear with me for a moment. I'm Dan Zeiser. I'm the chair of the panel.

MR. BENDER: My name is Steve Bender, and I'm an industry arbitrator.

MR. ELLIS: My name is James Ellis. I'm also an industry arbitrator.

MR. ZEISER: I have a couple disclosures I need to make. I made the one previous to the one when I first got involved in the case. In a previous position I was employed by KeyBank. Ulmer & Berne was one of the firms that the bank used in NASD matters. I did not work with either Mr. Bravo or -- I'm sorry, I forgot the other name --

MR. BRAVO: Mr. Morelli.

MR. ZEISER: -- Mr. Morelli there. I worked with Michael Ungar. That's my first disclosure. Those were both on some NASD matters.

Second disclosure is on the witness list filed by Berry and Spencer, I believe it is, Scott

[Page 4]

Kahn is listed. And in one of the exhibits attached to one of the motions I noticed an affidavit from Scott Kahn, who is a lawyer. I know a Scott Kahn who is an attorney. He's a partner at McIntyre, Kahn, Kruse and Gilambardo. I don't know if it's the same one.

Did you folks receive that?

MR. McCOMB: We did.

MR. ZEISER: Okay. Those are the two disclosures. Any questions about either of those disclosures?

MR. McCOMB: No. We have no objection.

MR. FORTUNATO: No objection.

MR. JACOBSON: No objection.

MR. BRAVO: No objection.

MR. FALIN: No objection.

MR. ZEISER: Very good.

Do you have any disclosures?

MR. BENDER: I have no additional disclosures to make.

MR. ELLIS: I have a disclosure. I am serving as an arbitrator on another case involving Merrill Lynch, Bastounis versus Merrill Lynch, Bagby and Zepp. That matter hasn't been set for hearing yet.

[Page 5]

MR. Zeiser: Do the parties accept the panel?

MR. McCOMB: Merrill Lynch does.

MR. JACOBSON: Berry/Spencer do.

MR. FALIN: First Union does.

MR. ZEISER: Can we have everybody, all the

attorneys of record, who the parties are, who they represent?

MR. JACOBSON: I believe counsel mentioned Merrill Lynch does. I assume that means Merrill Lynch and Mr. Inhouse?

MR. FORTUNATO: Merrill Lynch and Mr. Inhouse.

MR. ZEISER: Correct.

MR. FORTUNATO: I am Michael Fortunato. I represent Mr. Inhouse and Merrill Lynch, also, along with my colleague, Mr. McComb.

MR. JACOBSON: William Jacobson, counsel for Diane Spencer and Robert Berry.

MR. BRAVO: Ken Bravo from Ulmer and Berne, co-counsel for Berry and Spencer.

MR. FALIN: Bill Falin, representing First Union. I'm from Moscarino and Treu, and my associate Mike Golding, is here this morning.

MR. Zeiser: I know I've submitted my oath. Have both of you submitted your oath?

NASD DISPUTE RESOLUTION, INC.
MERRILL LYNCH, PIERCE, FENNER
& SMITH, INC.,
Claimant,

v. NASD No. 01-02983

ROBERT W. BERRY,
DIANE L. SPENCER, and
FIRST UNION SECURITIES, INC.
Respondents,

v.

JOHN J. INHOUSE, III,
Third-Party Respondent.

BERRY/SPENCER'S ANSWER,
COUNTERCLAIMS, AND THIRD-PARTY CLAIMS

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NASD DISPUTE RESOLUTION, INC.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Claimant,

v. NASD No. 01-02983

ROBERT W. BERRY,
DIANE L. SPENCER, and
FIRST UNION SECURITIES, INC.
Respondents,

v.

JOHN J. INHOUSE, III,
Third-Party Respondent.

BERRY/SPENCER'S ANSWER, COUNTERCLAIMS, AND THIRD-PARTY CLAIMS

Robert W. Berry and Diane L. Spencer (collectively, "Berry/Spencer"), as and for their Answer to the Statement of Claim Merrill Lynch, Pierce, Fermer & Smith, Inc. ("Merrill Lynch"), Counterclaims against Merrill Lynch, and Third-Party Claims[1] against John J. Inhouse III ("Inhouse"), state as follows:

1. Berry/Spencer are former stock brokers at Merrill

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[1] The Counterclaims and Third-Party Claims collectively are referred to as the "Counterclaims," reflecting that Inhouse was acting on behalf of Merrill Lynch in the events giving rise to this case.

Lynch's Bath, Ohio office, and Berry is a former Resident Manager of that office. Respondent John J. Inhouse III, is the manager of the Akron complex of Merrill Lynch (which includes the Bath office).

2. On June 1, 2001, Berry/Spencer resigned from Merrill Lynch. This resignation followed several months of harassment and threats against Berry/Spencer by Inhouse and others at Merrill Lynch, which made it impossible for Berry/Spencer to continue at Merrill Lynch. This harassment was motivated in substantial part by Berry/Spencer's ages, and as retaliation for Berry having objected to actions by Merrill Lynch to conceal from regulatory authorities serious violations of industry rules and regulations by two favored brokers in the Bath office, including concealment of a serious customer complaint and settlement.

3. On June 4, 2001, Merrill Lynch went into federal District Court in Akron and obtained an ex *parte* Temporary Restraining Order ("TRO"), based upon affidavits and representations that were false and misleading. (At the hearing, we will present other examples of how the Cleveland District of Merrill Lynch has filed pro forma affidavits in other cases that wrongly accused the departing brokers of misconduct, similar to the false affidavits filed with respect to Berry/Spencer.) The District Court signed the TRO without Berry/Spencer having a chance to be heard or to submit opposition papers.

4. The falsehoods alleged in federal court were repeated in Merrill Lynch's simultaneous filing of the Statement of Claim in this case. Contrary to Merrill Lynch's dramatic accusations in the Statement of Claim, Berry/Spencer followed the law, as set forth in guidelines established by two federal court judges in Ohio, as to the contacts stock brokers

are permitted to have with clients when leaving a brokerage firm. (This law is discussed briefly later in this Answer, and will be addressed in greater detail later in Berry/Spencer's Pre-Trial Brief.)

5. In fact, Berry/Spencer did not do what Merrill Lynch routinely does when Merrill Lynch hires brokers from competitors. At the hearings, we will provide specific examples to the arbitrators where Merrill Lynch's Cleveland District has obtained other firm's customer records, and then asked Merrill Lynch employees to cover up this conduct. Merrill Lynch's request for injunctive relief should be rejected for many reasons, not the least of which is that Merrill Lynch has "unclean hands," meaning that Merrill Lynch itself engages in conduct far worse even than the false allegations made against Berry/Spencer.

6. The TRO essentially cut off all Berry/Spencer's contacts with their clients, including clients who had expressed a strong desire to follow Berry/Spencer to First Union. After Berry/Spencer submitted papers exposing the false nature of Merrill Lynch's filing, Merrill Lynch consented to a modification of the TRO, in the form of a preliminary injunction that permitted Berry/Spencer to deal with clients, albeit continuing to prohibit Berry/Spencer from initiating contacts with clients.

7. In this case, we will ask the arbitrators to strip away any restriction on Berry/Spencer, and to vacate the preliminary injunction. We also will ask the arbitrators to impose substantial punitive damages on Merrill Lynch and Inhouse for obtaining an injunction under false pretenses.

8. This case, however, involves a lot more than whether Berry/Spencer will continue to be restricted by the terms of

the preliminary injunction, or how much money Merrill Lynch and Inhouse must pay to Berry/Spencer. At the end of the case, we will ask the arbitrators not only to grant the Counterclaims, but also to make a disciplinary referral to the NASD, based upon Merrill Lynch's conscious failure to report to regulatory authorities a customer complaint and settlement. (See, NASD Code of Arbitration Procedure, § 10106)[2]

BACKGROUND AND FACTS

9. Berry/Spencer live in Akron, Ohio. Spencer, who is 56 years old and a native of Cleveland, joined Merrill Lynch in 1975, in Merrill Lynch's Cleveland, Ohio, branch office. Berry, who is 58 years old and a native of Akron, joined Merrill Lynch in 1978, also in the Cleveland office. Although each of Berry/Spencer had extensive prior work experience, joining Merrill Lynch was the start of their respective careers in the securities industry.

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[2] "If any matter comes to the attention of an arbitrator during and in connection with the arbitrator's participation in a proceeding, either from the record of the proceeding or from material or communications related to the proceeding, that the arbitrator has reason to believe may constitute a violation of the Association's Rules or the federal securities laws, the arbitrator may initiate a referral of the matter to the Association for disciplinary investigation; provided, however, that any such referral should only be initiated by an arbitrator after the matter before him has been settled or otherwise disposed of, or after an award finally disposing of the matter has been rendered ...."

A. Berry/Spencer Were Very Successful Brokers

10. Each of Berry/Spencer was extremely successful at Merrill Lynch. Spencer, who was one of the few female brokers in her branch for most of her career, built her book of business through hard work and diligence, with very little help from Merrill Lynch by way of account distributions or other perks normally accorded brokers with her production. Similarly, Berry built his business through a network of referrals and community activities, again with very little help from Merrill Lynch. Between them, Berry/Spencer developed an enviable list of long-term, loyal clients who read like a "who's who" of members of the business community in the greater Akron-Cleveland area.

11. Berry/Spencer built their books of business the right way, by keeping in mind the clients' best interest. By 1993, Berry/Spencer together had high six-figure gross production. In 1993, Berry was asked to help Merrill Lynch open an office for Merrill Lynch in Bath, Ohio, and to assume the position of Resident Manager for the office. Welcoming the opportunity to work closer to home, and the challenge of starting up an office, Berry accepted the offer.

12. In late 1993, both of the Berry/Spencer relocated to the Bath office. Because Berry's management role began to take up most all his time, Spencer took on the primary responsibility for servicing Berry/Spencer' substantial book of business. That book of business continued to grow and prosper, such that by 2000, Berry/Spencer' gross annual revenues exceeded $1 million.

13. Through their combined efforts, Berry/Spencer earned both cash and deferred compensation. The cash

compensation was paid in the form of normal paychecks. The deferred compensation was paid through participation in the "FCCAAP" deferred compensation plan for financial consultants. Because of their ages and lengths of service, Berry/Spencer also were earning extraordinary lifetime benefit packages, including highly favorable lifetime medical coverage.

B. The Bath Office Was A Stellar Performer Under Berry's Guidance

14. The Bath office was an "associate" office, meaning that it reported to another, larger office. From late 1999 until January 2001, the Bath office reported to the Akron, Ohio, office for operations and compliance matters, and to the Cleveland office for sales matters. In other words, until early 2001, the Akron office was responsible for the compliance and operational expenses of the Bath office, but the sales revenues were credited to the Cleveland office.

15. During the time period most directly relevant to this case, the branch manager of the Akron office was Inhouse, and the branch manager of the Cleveland office was non-party Seldon Martin. (Martin was the branch manager of the Akron office until late 1999, when Inhouse replaced Martin and Martin moved to the Cleveland office.) Inhouse and Martin reported, in turn, to Cleveland District Director David Ruckman. In January 2001, the Bath office was reassigned, and reported to the Akron office under the command of Inhouse, for both operations and sales.

16. Under Berry's leadership beginning in 1993, the Bath office flourished. Starting out with just three other brokers (in addition to Berry/Spencer) when the office opened, by January 2001, the Bath office had approximately

18 other brokers. These brokers were a combination of brokers hired from the competition and brokers who were unhappy at other Merrill Lynch offices. Berry's compensation as Resident Manager of the Bath office consisted of both (i) cash compensation through a year-end bonus based on the performance of the Bath office, and participation in a year-end bonus given by the Cleveland District Director, and (ii) deferred compensation through the "RMCAAP" deferred compensation plan for Resident Managers.

17. Under Berry's guidance, the Bath office was a stellar performer. The Bath office was selected as Merrill Lynch's "SMO of the Year" in 1994, its first year as an office, and "Associate Office of the Year" in 1999, wherein Berry received an award as the best manager of an associate office. This national honor was bestowed upon Berry based upon his performance and that of the Bath office on certain critical objectives used by Merrill Lynch to measure the performance of its branch offices.

18. Growing the office was not easy, given the reporting lines set in place by District Director Ruckman. Since the Bath office reported to the Akron office for operational issues, it was incumbent upon the Akron office to expend labor and funds necessary for the growth of the Bath office. The Akron office, however, did not receive the sales revenues from the Bath office (which reported to Cleveland for sales).

19. Despite the lack of proper funding for the Bath office's operations, Berry managed to run the office efficiently and in a manner that did not negatively impact the clients. Moreover, until the events giving rise to this case, the Bath office was flee from any significant compliance problems, since Berry insisted that the brokers in his office

conduct themselves in accordance with firm and industry rules and good business practices.

C. Inhouse Took Over The Akron Office In Late 1999

20. In late 1999, respondent Inhouse, who is in his early 30's, became manager of the Akron branch office. Inhouse had no prior experience running a branch complex. Inhouse's management experience came from previously having run the "cold-call" telemarketing sales office of a health spa, and short stints as a broker, a sales manager under Ruekrnan, and a sales manager in the Columbus office.

21. Inhouse was very friendly with Ruckman, the District Director. Ruekman referred to Inhouse as the "son I'd never had." Repeatedly throughout Inhouse's short career in the securities industry, Inhouse had been the beneficiary of Ruckman's favors.

22. Inhouse also developed a cadre of several aggressive brokers in their 20's and 30's, including broker Jason DiLauro (who worked as a team on accounts with Jim Woods). Inhouse, DiLauro, and several other brokers, were referred to by people as the "rat pack." Inhouse is known for his aggressive style. Inhouse had bragged to Berry that Inhouse once had thrown a broker against the wall because the broker was not wearing a suit jacket in the lobby of the office building, although Inhouse later denied this incident in an arbitration brought by the injured broker.

D. Inhouse Expressed His Disagreement With Berry's "Old and Outdated" Style

23. After Inhouse took over the Akron office in late 1999, Inhouse began to express age-based criticisms of Berry. Inhouse claimed that Berry's management style was "old and outdated." Inhouse stated that his management style, by contrast, was "21st century." Berry responded that perhaps Inhouse could learn something from his elders. (Exhibit 1)

E. Inhouse Withheld Operational Support For The Bath Office

24. During the course of 2000, Inhouse repeatedly withheld operational support from the Bath office, just as the office was expanding both its space and head count. This led Berry to go over Inhouse's head in an attempt to secure the necessary support for the office, such as a properly functioning telephone system.

25. Rather than solving the operational issues caused by the Akron office's lack of support for the Bath office, in the spring of 2000, Ruckman changed the Bath office's "baseline." The "baseline" is the measurement of certain financial parameters upon which Merrill Lynch managers are evaluated and compensated. This had the effect of making Inhouse's performance, which looked poor at the time, look better, and Berry's performance, which was showing a repeat of the record performance of 1999, look worse, although nothing had changed. Changing a branch's baseline is almost unheard of at Merrill Lynch, and was just another indication of Ruckman's efforts to advance Inhouse's career.

26. Were it not for the change in baseline, the Bath office was on track to repeat in 2000, the extraordinary

performance of 1999 that earned it and Berry the honor of "Associate Office of the Year." Even with the change in baseline, however, the Bath office in 2000 still met its performance objectives. The change in baseline, however, did cost Berry additional compensation, which Ruckman promised to make up to him but never did.

F. In The Fall of 2000, Berry Uncovered A Series Of Questionable Actions By The Woods/DiLauro Team

27. Monitoring broker compliance with Merrill Lynch and industry rules and regulations was part of Berry's responsibilities as Resident Manager of the Bath office. Under Merrill Lynch policy, Resident Managers check broker use of e-mails. The brokers in the office were informed of this policy.

28. Berry had a particular concern regarding the Woods/DiLauro team, who were close friends with Inhouse, and ran in the same crowd of aggressive brokers.

29. Berry informed Adam Schoesler (the Cleveland District Administrative Manager) of these concerns during the Summer of 2000.

29. On September 26, 2000, Berry reviewed an e-mail message from broker James Woods to a customer indicating certain transactions had been done in the customer's account, leaving it unclear whether the customer had authorized the transactions in advance. Berry responded to Woods by questioning the authorization. (Exhibit 2) Berry also reported to the Akron Administrative Manager, Robert Wright, and the Cleveland manager, Martin, that the Woods/DiLauro team needed to be watched closely.

30. On October 4, 2000, Berry learned that broker Jason DiLauro, Wood's partner, might have been diverting business away from Merrill Lynch. Berry informed Robert Wright (the Akron Administrative Manager), Schoesler (the Cleveland District Administrative Manager), and others about this issue. (Exhibit 3)

31. On November 3, 2000, broker Woods sent an e-mail to a client indicating, in an attempt to assuage the client's concerns about the account performance, that Woods himself owned the same securities. (Exhibit 4) Berry, upon checking Woods' own account records, discovered that Woods had lied to the customer, and did not own the same securities as the customer. Berry reported this issue to Martin, Schoesler and Wright.

32. On November 15, 2000, Berry obtained an e-mail sent on November 14, 2000, by broker Woods to a client, indicating that Woods was informing the customer for the first time of transactions that already had taken place in the account. Among other things, Woods suggested that certain trades could be cancelled after the fact if the customer was not happy with the trades. (Exhibit 5) Berry forwarded the pertinent documents to Wright and Schoesler and followed up with an e-mail. (Exhibit 6)

33. On November 17, 2000, Berry again expressed his concerns regarding the Woods/DiLauro team in an e-mail to Wright and Schoesler. (Exhibit 7) Berry also forwarded the materials and e-mail to Martin, after Martin indicated he was not aware of the situation. (Exhibit 8) Berry also expressed his concern with a form letter Woods wanted to send to clients. (Exhibit 9)

G. Berry Was Warned That He Was "Too Compliance Oriented"

34. During a conversation following Berry's report of the problems with the Woods/DiLauro team, Martin (the Cleveland branch manager) stated that Berry was much "too compliance oriented," which was not "broker friendly." Martin also warned Berry, that if everyone followed all the rules and regulations, Merrill Lynch would never do any business, and that customer complaints were just part of the risk of doing business. These comments were similar to prior comments made to Berry by Ruckman and Schoesler unrelated to the Woods/DiLauro issues.

35. Martin also warned Berry not to put such compliance issues in memo or e-mail form. (This was similar to a statement Ruckman had made about his habit of not leaving a paper trail, and a comment by Schoesler that the firm was considering taking away Berry's e-mail privileges because he documented too much in the e-mails.)

H. In December 2000, Berry Received A Serious Customer Complaint Regarding The Woods/DiLauro Team

36. On December 6, 2000, customers Gary and Joyce Hargreaves came to the Bath office asking to speak with Berry about a problem. Berry, who was not previously aware of any problem with the Hargreaves, was happy to meet with them.

37. In the meeting, the Hargreaves asserted that broker DiLauro had engaged in unauthorized transactions. The Hargreaves indicated that on November 15, 2000, they met with DiLauro, to discuss possibly transferring their accounts from Charles Schwab. DiLauro had the Hargreaves sign blank

transfer documents, but it was agreed that the transfer would not take place until the Hargreaves had a second meeting with DiLauro at which point DiLauro would present an investment plan. Mrs. Hargreaves, in particular, had expressed concern about signing blank transfer papers, but DiLauro assured her that the papers would be held in the file until an investment plan was approved.

38. On or about November 30, 2000, however, the Hargreaves learned that DiLauro had sold out their accounts at Schwab, and instructed Schwab to send checks for the proceeds to Merrill Lynch. The Hargreaves immediately called DiLauro to complain. DiLauro never informed Berry or any other supervisor of this customer complaint.

39. Not long afterwards, the Hargreaves received a "Consults Questionnaire" delineating the customers' investment objectives, etc., that was necessary for opening the "Consults" accounts at Merrill Lynch. The Hargreaves were shocked to find out that DiLauro already had filled out the questionnaire. The Hargreaves refused to sign the questionnaire since it was inaccurate. The Hargreaves also expressed their concerns to broker Woods, but neither DiLauro nor Woods brought the matter to Berry's attention.

40. During the meeting with the Hargreaves, the Hargreaves indicated that DiLauro admitted to them, the night before, that DiLauro should not have transferred the accounts against the customer's wishes. The Hargreaves stated that they had been damaged in the amount of approximately $23,000, and wanted Merrill Lynch to compensate them. A copy of Hargreaves complaint letter, sent a few days later, confirming their complaint is annexed as Exhibit 10 hereto.

I. Merrill Lynch Immediately Settled The Customer Complaint

41. Berry immediately e-mailed Wright and Sehoesler, as well as the Office of General Counsel, documenting the Hargreaves customer complaint. (Exhibit 11)

42. Merrill Lynch agreed to settle with the Hargreaves (Exhibit 12), although the dollar amount took a couple of weeks to finalize. (Exhibits 13 and 14)

43. Much to Berry's shock, Merrill Lynch failed to take any action against DiLauro or Woods. To the contrary, Woods came into Berry's office one day to brag that the Hargreaves complaint was going to be treated by Merrill Lynch as a trade error, and that Woods and DiLauro were not going to be hit with the cost of the "error" since it would be charged off to the Bath office. (Exhibit 15)

J. Merrill Lynch Never Reported The Customer Complaint Or Settlement

44. The NASD maintains the Central Registration Depository ("CRD") as a central reporting mechanism for broker background information and regulatory compliance matters. Various other regulatory agencies, including state securities regulators, have access to and regularly check the CRD database.

45. Uniform Form U-4 is the mechanism by which member firms, such as Merrill Lynch, must report certain required information regarding broker conduct. A copy of Form U-4 and applicable reporting pages, is attached as Exhibit 16.

46. Form U-4 specifically requires that the NASD be notified, through the filing of an amended Form U-4, where any of responses to Question No. 23 is answered in the affirmative. Those questions address both customer complaints and settlements in excess of $10,000:

> "Question 23.I(2). Have you ever been the subject of an investment-related, consumer-initiated complaint... which alleged that you were involved in one or more sales practice violations, and which complaint was settled for more than $10,000?"
>
> Question 23.I(3). Within the past twenty four (24) months, have you been the subject of an investment-related, consumer-initiated, written complaint ... which
>
> > (a) alleged that you were involved in one or more sales practice violations and contained a claim for compensatory damages of $5,000 or more (if no damage is alleged, the complaint must be reported unless the firm has made a good faith determination that the damages from the alleged conduct would be less than $5,000)...?"

47. The NASD provides interpretive guidelines to member firms. A copy of the relevant page from these interpretive guidelines is annexed as Exhibit 17. These guidelines make clear that even oral complaints must be reported, if they result in a written settlement:

> "Question 23I(2)
>
> Q 1: Is a registered person required to report an oral

complaint? What if a customer makes an oral complaint that is resolved through a written settlement agreement for $10,000 or more that acknowledges that the customer alleged a sales practice violation, and there is no other writing that evidences the complaint?

A: An oral complaint by itself is not reportable under Question 23I(3). An oral complaint that alleges a sales practice violation that is settled for $10,000 or more is reportable under Question 23I(2)."

48. Despite these clear guidelines, Merrill Lynch failed to report either the Hargreaves customer complaint or the settlement to regulatory authorities. Copies of the CRD printouts for Woods and DiLauro are annexed as Exhibits 18 and 19, and reflect, even at this late date, that no customer complaints or settlements against Woods or DiLauro have been reported by Merrill Lynch to the NASD.

K. Inhouse And Others In Merrill Lynch Management Retaliated Against Berry

49. In a series of e-mails and conversations during December 2000, Berry pressed the issue of reporting the Hargreaves customer complaint to the appropriate regulatory authorities, as required by Merrill Lynch policy. (Exhibits 20 and 21) Berry vigorously protested Merrill Lynch's refusal to fulfill its regulatory obligations regarding the Hargreaves customer complaint, and was met with hostility.

50. On December 14, 2000, Berry spoke with Selden Martin, the Cleveland branch manager. Martin suggested that Berry and Spencer consider retiring to Santa Barbara, California. Martin further stated that the Bath office likely was going to be reassigned so that it reported for all purposes

to the Akron office, which was run by Inhouse. Martin stated that Inhouse would make Berry's life "miserable," and questioned whether Berry wanted to subject himself to that type of harassment. (Exhibits 22 and 23)

51. In a conference call with Messrs. Inhouse, Wright, Schoesler and Martin in December 2000 regarding the Hargreaves complaint, Berry was told that he was not a "team player," for reporting DiLauro to the Office of General Counsel and was paranoid about compliance issues. Berry also was told that he was not broker friendly, and was criticized for providing DiLauro's CRD number and social security number to the Office of General Counsel without first checking with them.

52. Berry learned in the course of these discussions and events that the Hargreaves complaint was going to be buried by Merrill Lynch to cover it up for Woods and DiLauro. (In fact later DiLauro would be promoted to a management position at Merrill Lynch by Inhouse.) Berry immediately contacted Ruckman, the District Director, to alert him to the situation. (See Exhibit 15)

53. Soon after Berry complained to Ruckman, Berry was contacted by Inhouse for lunch. At the lunch meeting, Inhouse denied the comments attributed to Inhouse by Martin, that Inhouse was going to make Berry's life "miserable."

L. Inhouse Removed Berry As Manager In Early January 2001

54. On January 3, 2001, Berry was attending a branch managers meeting in Arizona. Berry attended a breakfast meeting with Messrs. Ruckman, Inhouse, Martin, and Schoesler. Ruekman, who had known Berry for over 15

years, left the table before the others were finished.

55. After Ruckman had left, Berry again was asked whether he was interested in transferring to Santa Barbara, and was told that Berry and Spencer could transfer their books of business to an office in that location. Berry indicated that he was not interested in a transfer.

56. Berry then was informed that he was being removed as Resident Manager of the Bath office, and that Inhouse was taking over the Bath office. Berry was told that the decision to remove him had been made just days earlier. Berry was told that Merrill Lynch wanted "new blood" in the office, that Berry was a "dinosaur," and that Berry's management style was old and outdated. Berry asked if Merrill Lynch had any specific complaints about Berry's work, and he was told that Berry's removal had nothing to do with his performance.

57. Indeed, when Martin announced the reassignment of the Bath office in mid-January 2001, Merrill Lynch admitted that the office had "experienced solid CFO ["Critical Few Objectives"] performance the last two years. ..."(Exhibit 24)

58. Berry was told that he was being offered the opportunity to resign. Berry was told, for the first time, that there had been two Human Resources complaints recently lodged against him. Berry was told that if he did not resign, Human Resources would "descend" upon him and "humiliate" him in the Bath office. These contrived

complaints were false, as Merrill Lynch was aware.[3] Berry refused to resign.

59. On January 8, 2001, Berry complained to Human Resources over his treatment, including the age discrimination and retaliation. (Exhibit 25) Although Berry's complaint was supposed to be treated by Human Resources as confidential, Human Resources informed Messrs. Wright and Inhouse of the complaint. A few hours later, Berry formally was removed as Resident Manager on January 8, 2001.

60. Berry was replaced by a 40-year-old interim Resident Manager, who had no prior industry management experience or, as of that date, proper registration to act as a branch manager. (Exhibit 26) No permanent replacement has been named as of this date, but it is believed that DiLauro, along with other members of the "rat pack," have lobbied for and are being considered for the position to replace Berry.

M. Ruckman Admitted That Inhouse Was Behind The Termination

61. Not long after Berry's removal, Spencer received a telephone call from Ruckman. In that phone call, Ruekman seemed apologetic about Berry's removal, stated that he couldn't stop Inhouse from removing Berry, and claimed to know little about it.

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[3] Berry was told later that month that DiLauro made one of the complaints and that Berry should forget about it. Berry further was told that the other complaint was not against him, but against his wife Diane Spencer, and consisted of a claim by a sales assistant that Spencer had yelled at her in the office, on a day Spencer was not even in the office.

62. Spencer had known Ruckman for over 15 years, and knew how he ran the Cleveland District, his views on people, and how he interacted with the people who worked for him. Spencer expressed her disbelief as to Ruckman's supposed lack of involvement. Ruekman, however, never backed away from his contention that Inhouse was the driving force behind the decision to remove Berry.

N. Merrill Lynch and Inhouse Sought To Drive Berry/Spencer From The Firm

63. In the ensuing four months after Berry's removal, respondents sought to drive Berry/Spencer from the firm by creating an intolerable and hostile work environment in numerous ways.

64. For example, Berry was approached by Inhouse, who suggested that Berry/Spencer plan on retiring and transitioning their books of business to "younger" brokers. Inhouse stated that Merrill Lynch would make the transition financially rewarding to Berry/Spencer. Berry/Spencer declined the offer to retire.

65. By no later than February 14, 2001, the Akron office had allocated Berry/Spencer's accounts to other brokers in the office, and had printed individual reports for each of Berry/Spencer' clients, listing the clients' positions. These printouts were intended for distribution to other brokers in the office in anticipation of Berry/Spencer leaving Merrill Lynch. (The February distribution list and printouts were in fact used in June 2001 when Berry/Spencer left Merrill Lynch.)

66. These actions to prepare for Berry/Spencer' departure were taken even though Berry/Spencer had expressed no desire to leave Merrill Lynch, and in fact had

expressed a desire to stay at Merrill Lynch in the Bath office. The fact that Merrill Lynch took these actions as early as February 2001 proves beyond any legitimate doubt that Merrill Lynch was planning to terminate and/or force the Berry/Spencer out of the firm so that Merrill Lynch could take Berry/Spencer' books of business for distribution to "younger" brokers.

67. Merrill Lynch also made a point of having brokers on call on Friday afternoons at a bar near the office (at Merrill Lynch's expense) waiting for Berry/Spencer to leave, so that the brokers immediately could start calling the clients. (Exhibit 27) In one instance, when another broker left the office to go to a competitor, Inhouse announced to the people waiting on call that the wrong person had left. By pitting the office against Berry/Spencer, Inhouse created an extraordinarily hostile work environment.

68. Berry/Spencer complained about this harassing treatment and retaliation. Berry/Spencer made clear that they had retained counsel to represent them with regard to this unlawful conduct by Merrill Lynch. (Exhibit 28) Nonetheless, the harassment got worse.

69. As a result of the hostility to Berry/Spencer fostered by Inhouse, in April 2001, DiLauro threatened another broker in the office who was friendly with Berry/Spencer. DiLauro approached the broker's wife near her home. DiLauro said that her husband had been seen talking to Berry, that Berry was "going down," and that if her husband kept talking to Berry, the husband would "go down" also. When informed of this threat, Inhouse laughed it off, although later Inhouse denied laughing at the complaint. (Exhibit 29)

70. Both Berry and the broker filed complaints with Human Resources about these threats (Exhibit 30) and also complained again to District Director Ruckman (Exhibit 31), but no disciplinary action was taken against DiLauro. (Exhibits 32 and 33)

71. The hostility to Berry/Spencer extended beyond Inhouse and those who worked for him in the Akron and Bath offices. Early in 2001, Berry again expressed his concern to Sehoesler (the Cleveland District Administrative Manager) that the Hargreaves customer complaint and settlement had not been reported. (Exhibit 34) Berry commented to Schoesler, that the treatment by Merrill Lynch of the Hargreaves customer complaint about DiLauro was typical of the Cleveland District's practice of hiding customer complaints for favored brokers by mischaracterizing the settlements as a "policy settlement" or trade error. Berry also expressed concern regarding other questionable compliance actions by management that Berry had questioned and reported when serving as Bath office manager.

72. Schoesler became furious with Berry. Schoesler questioned whether Berry wanted "the SEC and NASD descending on the entire Cleveland District." Schoesler also claimed, falsely, that Sehoesler knew of unreported customer complaints about Berry. Berry responded that if Sehoesler knew of unreported customer complaints, Sehoesler should report them.

73. In addition to the outright hostility to Berry/Spencer, Merrill Lynch also retaliated against Berry/Spencer in numerous other ways. Merrill Lynch withheld sales support staff entirely for a period of time. (Exhibit 35) Then Merrill Lynch assigned Berry/Spencer

(along with 2 other brokers, for a total of 4 brokers) to a relatively new sales assistant who was not familiar with the most basic procedures. (Exhibits 36 and 37) Based on Merrill Lynch's own procedures, the support staff given Berry/Spencer was not in line with what was provided other brokers with similar experience and revenues. (Exhibit 38)

74. As a result, Berry/Spencer' client paperwork was not being processed properly, leading to numerous client complaints about how Merrill Lynch was treating the clients, including client threats to go to other firms because the situation had become so bad. When Berry/Spencer insisted that the sales assistants do their job, Inhouse threatened to fire Berry/Spencer. (Exhibit 39)

75. As part of the pattern of harassment of Berry/Spencer, Merrill Lynch encouraged numerous petty acts against Berry/Spencer. For example, in February 2001, when another broker left Merrill Lynch, Berry's nameplate was removed from the door to Berry's office and replaced with the departed broker's nameplate. (Exhibits 40 and 41)

76. Further, despite repeated requests from Berry/Spencer, Merrill Lynch refused to correct errors in Merrill Lynch's reporting of IRA account distributions taken by Berry/Spencer, causing Claimant's potentially to incur unnecessary tax liabilities and expenses. Berry/Spencer retained counsel to address this matter with Merrill Lynch, but Merrill Lynch still did not correct the problem. (Exhibit 42)

O. Berry/Spencer Resigned
<u>On June 1, 2001</u>

77. Berry/Spencer did not want to leave Merrill Lynch, the only place they ever had worked in the securities industry. Berry/Spencer had several hundred thousand dollars in deferred compensation in the FCCAAP and RMCAAP plans, that was at risk of loss if Berry/Spencer left.

78. The situation, however, had become intolerable for Berry/Spencer. Merrill Lynch had spent months tolerating, and encouraging, outright hostility to Berry/Spencer. Given the extraordinary hostility of Inhouse and his team against Berry/Spencer, it became obvious to everyone that Berry/Spencer had no choice but to leave Merrill Lynch, or face termination and/or a destruction of their business.

79. Susan Ryan in Merrill Lynch Human Resources, in response to Berry's numerous communications regarding the problems, told Berry that Human Resources had recommended to Ruckman and Inhouse that Berry and Spencer be permitted to leave Merrill Lynch with their benefits, including the FCCAAP and RMCAAP deferred compensation. Ryan stated, however, that Human Resources did not have funds for that, and that it was Ruckman and Inhouse's decision. (Exhibit 43)

80. Ryan later indicated that Ruekman had rejected Human Resources' recommendation. Ryan indicated that she was going to take the issue higher in the organization, but Berry never heard back from her in this regard.

81. Similarly, in a conversation with Schoesler in April 2001, Schoesler stated that if Berry/Spencer left Merrill Lynch, Merrill Lynch would not attempt to prevent Berry/Spencer from transferring their book of business, and would not seek to obtain a "TRO" preventing Berry/Spencer from soliciting their books of business.

82. Berry/Spencer resigned from Merrill Lynch on June 1, 2001, and joined First Union Securities in Akron.

P. Merrill Lynch and Inhouse Unlawfully Have Interfered With Berry/Spencer' Relationships With Clients

83. Immediately after Berry/Spencer' forced resignation, respondents unlawfully set out to disrupt Claimant's relationship with their clients. While Merrill Lynch certainly had the right to compete fairly for the business, Merrill Lynch did not have the right to spread lies about Berry/Spencer and to engage in other unethical conduct.

84. Among other things, several Merrill Lynch brokers acting under the direction of Inhouse, including Woods and DiLauro, have stated to clients that Berry/Spencer were "old," and represented that Berry/Spencer planned on retiring soon. (Not surprisingly given their close relationship with Inhouse, the Woods/DiLauro team was a major recipient of account distributions from Berry/Spencer' book of business.) This representation about Berry/Spencer' plans to retire was false, and was made for the purpose of attempting to induce the clients not to do business with Berry/Spencer, since the clients supposedly would have to get another broker when Berry/Spencer retired.

85. The statements regarding Berry/Spencer' age and supposed impending retirement were made to so many clients made by so many brokers, that the comments could only have been a deliberate strategy by Merrill Lynch to try to use Berry/Spencer' age to Berry/Spencer' detriment.

86. Merrill Lynch brokers also have made comments to clients suggesting that Berry/Spencer engaged in some unspecified impropriety leading to a "federal restraining order." In fact, as Merrill Lynch knew, the TRO was entered

ex parte based on Merrill Lynch's false accusations, and did not reflect any ruling by a federal court on the merits.

87. Merrill Lynch also improperly has delayed account transfers, and in some instances, falsely told clients that assets could not be transferred. (Exhibits 44 and 45) In other instances, Merrill Lynch brokers disparaged Berry/Spencer' prior handling of accounts, falsely telling clients that the investments were not appropriate.

88. In at least one case, a Merrill Lynch broker made disparaging comments about Berry/Spencer not only to a client, but also to a client's accountant, all in an effort to convince the client to break off her relationship with Berry/Spencer.

89. Merrill Lynch also falsely has told callers that Merrill Lynch does not know where Berry/Spencer are, and has failed to forward messages to Berry/Spencer. (Exhibit 46)

90. While many customers have objected to the improper tactics of Merrill Lynch against Berry/Spencer (e.g., Exhibits 47-52), Merrill Lynch has succeeded in disrupting many client relationships and delaying the transfer of accounts.

Q. Berry/Spencer Have Been Severely Damaged By Merrill Lynch and Inhouse

91. As the result of Berry being removed as manager of the Bath office, and Berry/Spencer being forced to resign, Berry/Spencer have suffered enormous damages. In all, the

financial damage to Berry/Spencer far exceeds $2 million.[4] The elements of the damages to Berry/Spencer include, but are not limited to, the following:

(a) Loss of Berry's manager's annual compensation, estimated to total approximately $80,000 per year;

(b) Loss of Berry/Spencer' respective FCCAAP and RMCAAP deferred compensation, estimated to total approximately $750,000, plus lost future contributions to FCAAP and RMCAAP;

(e) Loss of income from lost clients, estimated to total hundreds of thousands of dollars per year; and

(d) Loss of Berry/Spencer' benefits, including life insurance and lifetime medical benefits.

DEFENSES

92. The Statement of Claim for the most part is a generic, boilerplate document, with Berry/Spencer's names plugged in where the broker's name is called for in the document. There are few specific allegations, and to the extent we have failed to address an allegation, it should be deemed denied. Since Merrill Lynch has chosen not to number paragraphs or allegations, we are compelled to respond in kind.

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[4] Berry/Spencer's damage calculation will be updated prior to the hearings, after discovery, including as to Merrill Lynch's records as to the balances as of the date of termination in the Berry/Spencer' respective FCCAAP and RMCAAP deferred compensation plan accounts.

A. Berry/Spencer Deny The Accusations Made By Merrill Lynch

93. Berry/Spencer deny that they violated any contractual obligations to Merrill Lynch, misappropriated or converted Merrill Lynch's trade secrets or business property, breached any fiduciary duty, or engaged in any unfair competition. As further detailed above, Berry/Spencer deny that their success was due to training or support, customer referrals or leads, or lists purchased by Merrill Lynch. Merrill Lynch's standard form allegations simply have no beating in this case.

94. Berry/Spencer further deny improperly obtaining, removing, or disclosing the identities of or account statements of customers. Berry/Spencer, in the normal course of business and long before they contemplated leaving Merrill Lynch, regularly kept documents at home due to the lack of storage space at the Merrill Lynch office. Those documents, and the account information therein belonged to the customers, and were not disclosed to First Union in any improper way. The customers were entitled to transfer their accounts to First Union and to have Berry/Spencer use the customers' information to effectuate the transfer.

95. Certainly, Merrill Lynch does not treat other firms' customer records as confidential, since Merrill Lynch regularly obtains that information for the purpose of assisting Merrill Lynch's hiring of brokers from the competition.

B. Berry/Spencer Legally Were Entitled To "Informational Contacts" With Clients

96. Berry/Spencer deny engaging in any improper solicitation of clients, either prior to or after resignation.

Rather, all Berry/Spencer did was, after resigning, to make information telephone calls and announcements, informing customers of their new location. Copies of the announcements are annexed as Exhibit 53)

97. The announcement by Berry/Spencer of their new location is the procedure permitted under guidelines established by two federal court judges in Ohio.

98. The precise issue presented here, i.e., what constitutes a "solicitation" under Merrill Lynch's contract, was before Judge Solomon Oliver of the Northern District of Ohio in Merrill Lynch v. Vincent C. LaMaida, et al., Case No. 1:01CV675 (N.D. Oh. March 23, 2001)[5] In LaMaida, the brokers sent out written announcements, virtually identical to the one sent by the Berry/Spencer here, and orally informed their clients of their new affiliation. Merrill Lynch filed a Motion for a Temporary Restraining Order claiming, exactly as it does here, that the oral and written announcements were a violation of the non-solicitation provision in the Merrill Lynch agreement. Judge Oliver rejected this argument and held that the announcements were only "information contacts" and were not solicitations in violation of the Merrill Lynch contract. Judge Oliver specifically held:

> ... this court determines that a mere 'information contact' between LaMaida and Hardy and any former client will not constitute a 'solicitation'. See *Wells*, 919 F. Supp. at 1053. For purposes of this TRO, an 'information contact' consists *only* of 'any written or

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[5] Copies of this, and other pertinent decisions, will be annexed to Berry/Spencer's Pre-Hearing Brief, to be submitted at a later date.

> oral contact that provides information about the [financial consultants'] whereabouts and how they may be contacted'. (Id.)

99. The exact same decision was reached by Judge Katherine O'Malley in Merrill Lynch v. Kent D. Hageman, Case No. 1:01CV00925 (N.D. Oh. January 12, 2001). As in LaMaida, and exactly as done here, there the broker both sent out written announcements and orally informed his clients via telephone calls that he had left Merrill Lynch to work for Morgan Stanley. Merrill Lynch, just as it has done here, moved for a temporary restraining order making all the same allegations it does here, including claiming that the announcements were unlawful solicitations under its agreement. Judge O'Malley rejected Merrill Lynch's arguments. She enjoined Hageman from "soliciting" any of his clients. However, she clearly defined what constituted a solicitation and announcements where held not to be "solicitations". Specifically, Judge O'Malley held:

> "The Court finds that a mere "information contact" between Hageman and any former client will not constitute a "solicitation." See Wells v. Merrill Lynch, Pierce, Fermer & Smith, Inc., 919 F.Supp. 1047, 1053 (E.D. Ky. 1994) An "information contact" consists *only* of "any written or oral contact that provides information about the Plaintiffs whereabouts and how they may be contacted." *Id.*

100. Berry/Spencer comported their conduct to that recently found by Judge O'Malley and Judge Oliver, many other courts and arbitrators not to be a solicitation. The conduct by Berry/Spencer was perfectly legal.

C. It Is Standard Industry Practice To Use Account Statements, Which Is What Merrill Lynch Typically Does

101. The good conduct of Berry/Spencer is the exception to industry practices. Merrill Lynch's conduct in obtaining customer records from other firms is standard practice in the securities industry.

102. For example, in Merrill Lynch v. E.F. Hutton, 403 F. Supp. 336 (E.D. Mich. 1975), the Court observed that the customers' "preferences... cast doubt upon [Merrill Lynch's] proprietary claim to the copies of the [customer records]" because they establish:

> "that it is the usual practice for account executives to retain photocopies of records when they change employers. Furthermore, the individual defendants indicate that **removal of records and solicitation of clients is consistent with industry practice, and that plaintiff has, in fact, sanctioned such action ....** [T]he records in question relate to accounts which they had personally obtained and not to accounts given to them by plaintiff...."

403 F. Supp. at 441 (footnotes omitted)(emphasis added). See also, Merrill Lynch, Pierce, Fenner & Smith v. Bramer, No. C 93-1820, p.42 (N. D. Cal. May 25, 1993)("I don't think that [the brokerage firm] may necessarily be able to claim possessory interest in [clients and client lists] for all time by virtue of an early investment in training and salary where, in fact, the broker has over a long career developed clients and developed a client list."). In Doss v. Merrill Lynch, NASD Arbitration No. 95-02079 (1995), an NASD Panel rejected Merrill Lynch's contention that the account executive's

retention of his customer records after his departure from Merrill Lynch was violative of the trade secret statute and refused to order the return of such records to Merrill Lynch.

D. Customers Have A Right To Transfer And To Have Their Broker Use Customer Records

103. The public interest requires that customer records be available to the broker and customer when the broker transfers firms.

104. In Merrill Lynch, Pierce, Fermer & Smith, Inc. v. E.F. Hutton & Co., supra, the court refused to enjoin former account executives of Merrill Lynch from using the customer records that they copied. The court noted that:

> "The injury to [the account executives], when compared with the unsubstantiated harm to [Merrill Lynch], poses a legitimate concern. [The account executives] will be hampered in the pursuit of their business. [Merrill Lynch], on the other hand, is perfectly free to utilize the documents in question in a business capacity. In that vein, it is appropriate to note that [Merrill Lynch] speaks of maintenance of the status quo, yet a mandatory injunction of the type [Merrill Lynch] seeks, has a disruptive impact on the status quo." (403 F. Supp. at 344)

105. Likewise, the district court in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeLiniere, 572 F. Supp. 246 (N.D. Ga. 1983) held that:

> "If an injunction is granted, the broker may be prevented from serving the customers for whom he has worked over the last two years. It would leave him

with no client base in a business that thrives on commissions from regular clients." *Id.* at 249.

106. In H&R Block Financial Advisors, Inc. v. Dennis K. Bashaw, et al., Case No. 01CV000092, (Lake Cty C.P. April 10, 2001), the court found that H&R Block had shown a likelihood of success on the merits, yet it denied request for a temporary restraining order on several grounds. Regarding the interest to the public, the Court held as follows:

> "Furthermore, the Court finds an injunction would disserve the public interest. The interest of the trading public and customers of the parties are served when they are not entangled in internal disputes over which brokers would provide personal professional service to those customers and the trading public. If this Court attempts to set aside, reverse or otherwise modify the decisions and actions of *customers* of the parties, especially when such decisions and actions are still in the process of being completed, it would severely undermine the public's confidence in the court system and in the contractual decisions with those individual customers, presumably, voluntarily made."

107. Numerous other cases similarly have rejected injunctions in the public interest. See, Fifth Third/The Ohio Company v. Bolton, NASD No. 98-02-755 ("a factor that must also be considered is how this matter between the Claimant and Respondent affects the most important party in the retail brokerage industry, i.e. the retail client."... Now the injunction has the effect of telling the customer, You don't have a choice. You stay with the broker, the brokerage company. Now, in fact if we're talking about serving the public interest, the public interest in a free country...this is a free country, this is a competitive environment--in a

competitive environment the customer should have the presumptive ability to make a choice."); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. de Liniere, 572 F. Supp. 246 (N.D. Ga. 1983). ("The "public's ability to choose the professional service it prefers," is central to the consideration of this criteria of the injunctive relief. The public has a greater interest in being able to choose whether to follow its broker to a new firm or to remain at the old firm with a new broker."); Bramer, supra ("When you are looking at irreparable harm and public interest, certainly clients have as much an interest in this dispute that is going on here as either of the parties. And I think the court has an obligation to look out for those people.')

E. Merrill Lynch Has Unclean Hands

108. Merrill Lynch's course of conduct when it has recruited brokers from other firms also precludes injunctive relief under the doctrines of "judicial estoppel" and/or "unclean hands."

109. Recently, in Merrill Lynch v. Craig Dickerson, No 6:01-cv-75 (E.D. Tex. February 22, 2001), Merrill Lynch sought a TRO against Dickerson, its former broker who had left to work for Paine Webber. Merrill Lynch's request was denied on several grounds, including based upon the doctrines of "judicial estoppel" and "unclean hands". In denying Merrill Lynch's request for a TRO the Court held :

> "First, the Court takes judicial notice of the fact that it is standard practice in this industry for companies such as Paine Webber and Merrill Lynch to lure brokers from competing firms in order to "steal" away the competitor's clients. In fact, Plaintiffs counsel

admitted that Merrill Lynch is involved in a "significant minority of cases" where it has hired rival brokers to attract the rival brokerage firm's clients. In those situations, Merrill Lynch argues with a straight fact that these non-solieitatiort/covenant not to compete clauses are unenforceable, and that courts should not grant injunctive relief. Whether Merrill Lynch's behavior is viewed from the standpoint of the unclean hands doctrine or judicial estoppel, it is apparent that this conduct, while understandable, is difficult to reconcile with the request for extraordinary relief that is the hallmark of a TRO. **In sum, the Court will not allow Merrill Lynch to have its cake and eat it, too."** (Emphasis added)

110. A similar result was reached in Salomon Smith Barney, Inc. v. Voekel, 2000 U.S. Dist LEXIS 6167 (E.D. Pa. May 8, 2000) In Vockel, Smith Barney sued a broker who had accepted employment at PaineWebber. Before resigning, the broker supplied PaineWebber with client account statements so that it could prepare a mass-mailing "solicitation package" to those clients immediately after the broker resigned. The broker also took a copy of his client list, and he used that list to contact his clients that evening and over the weekend. The court denied Smith Barney's motion to enjoin the broker from using the client information to solicit his former clients. The court held that Smith Barney had "unclean hands" because it had engaged in precisely the same strategy when it had hired the broker away from Merrill Lynch. The court declared that:

"Smith Barney seeks the help of a court of equity to prevent the same conduct by Voekel which it had previously abetted and from which it has handsomely profited. Now it wants the court to prevent the loss of

> that profit. If what Vockel is doing in 2000 is wrong, it is hard to see why Vockel's and Smith Barney's conduct in 1994 was not wrong ....
>
> While we do not condone the behavior of Voekel, it is the behavior of Smith Barney on which we must focus here. Simply put, Smith Barney has not shown that it has come into this court with clean hands. In fact, the opposite has been established. Accordingly, as a court sitting in equity, we will not aid a wrongdoer. We will leave the parties to their monetary and other remedies before the National Association of Securities Dealers." Slip op. at *13-*14 (citation omitted).

111. The logic of Dickerson and Vockel apply with equal force to the present case. Merrill Lynch has clearly attempted to gain the Court's assistance to impose one set of restrictions when its own brokers leave, and permit a different - and far more lenient - set of rules when it recruits brokers from other firms. Specifically, while Merrill Lynch is attempting to destroy its former employees' careers, it is simultaneously engaging in the same conduct of which it now complains.

* * *

112. For all of these reasons, as well as the reason's set forth below, Merrill Lynch's Statement of Claim should be rejected in its entirely.

COUNTERCLAIMS AND THIRD-PARTY CLAIMS

113. Berry/Spencer have numerous legal claims against Merrill Lynch and Inhouse, which are summarized below, supporting Berry/Spencer's requested relief.

A. Age Discrimination

114. Discrimination based on age in any of the terms or conditions of employment is illegal. Both the employer (in this case, Merrill Lynch) and any person who aids in or incites the discrimination (in this case, Inhouse) are liable.

1) Applicable Statute

115. Ohio Statutes, § 4112.02, provides that is "shall be an unlawful discriminatory practice"

> "(A) For any employer, because of the... *age*... of any person to discharge without just cause, to refuse to hire, or otherwise to *discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment,* or any matter directly or indirectly related to employment.
>
> * * *
>
> (J) For any person to *aid, abet, incite, compel, or coerce* the doing of any act declared by this section to be an unlawful discriminatory practice, *to obstruct or prevent any person from complying with this chapter* or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice."
>
> * * *
>
> (N) An aggrieved individual may enforce the individual's rights relative to discrimination... by instituting a *civil action,* within two years after the alleged unlawful discriminatory practice occurred, in

any court of competent *jurisdiction for any legal or equitable relief that will effectuate the individual's rights*. . . ." (Emphasis added)

116. In cases of discrimination, the person who violates the law "is subject to a civil action for damages, injunctive relief, or any other appropriate relief." Ohio Statutes, § 4112.99. The Ohio provisions substantially mirror the applicable federal anti-discrimination provisions of the Age Discrimination in Employment Act.

2) Direct or Indirect Proof Sufficient

117. In order to prove age discrimination, a plaintiff may present either direct or indirect evidence, "of any nature, to show that the employer more likely than not was motivated by discriminatory intent." Mauzy v. Kelly Services, Inc., 75 Ohio St.3d 578, 587, 664 N.E.2d 1272, 1279 (1996).

118. Direct evidence of age discrimination would include derogatory age-related statements. For example in the Mauzy case the Ohio Supreme Court affirmed a funding of discriminatory intent where, despite the employees "great success over the years in her position as resident branch manager," the employee's supervisor "expressed her preference for younger employees, inquired into [the employee's] plans to retire," "berated [the employee] in front of her co-workers," "reduced [the employee's] staff and territory, introduced a younger employee to [the employee's] key customers," and made the comment that "you can't teach an old dog new tricks." See also. EEOC v. Pape Lift, Inc., 115 F.3d 676, 678 (9th Cir. 1997)(employee allegedly didn't "fit the mold of a young, aggressive type manager like [the company] had in most other management positions," was "too old to change" and "burnt out"); Siegel v. Alpha Wire Corp.,

894 F.2d 50, 53 (3rd Cir. 1990)(supervisor made comment that "old dogs don't know how to hunt").

119. Indirect proof of age discrimination follows the test under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), since the Ohio discrimination laws are to be "construed and decided in accordance with the federal guidelines and requirements" for the analogous federal discrimination statutes. Ahern v. Ameritech Corp., 137 Ohio App.3d 754, 769, 739 N.E.2d 1184, 1194 (2000). In order to prove a case through indirect evidence, a plaintiff must prove that he was over 40 years old, was discharged or otherwise subject to adverse employment action, was qualified for the position, and was replaced by a substantially younger person. Id. The burden then shifts to the employer to "come forward with evidence of a legitimate, nondiscriminatory reason" for the adverse employment action. Id., 137 Ohio App.3d at 770, 739 N.E.2d at 1195. To overcome the employer's alleged nondiscriminatory reason, the employee must "present evidence that the employer's proffered reason was a mere pretext for unlawful discrimination." Id.

120. Here, the evidence will be both direct and "indirect" proving that the actions taken against Berry/Spencer were motivated by Berry/Spencer' age.

3) Constructive Discharge

121. Where the employee resigned or refused a transfer, the employee may show that the termination was involuntary under the doctrine of "constructive discharge." An employee who resigns is deemed to have been involuntarily terminated if "the employer's actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign." Mauzy v. Kelly

Services, Inc., supra, 75 Ohio St.3d at 589, 664 N.E.2d at 1281-1282.

122. Accordingly, it is legally irrelevant that Berry/Spencer' "resigned." Given the clear hostility towards Berry/Spencer, Berry/Spencer acted reasonably in coming to the conclusion that they had no alternative but to resign. See also, Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982)(employee need not "go into another line of work, accept a demotion, or take a demeaning position"); Coleman v. City of Omaha, 714 F.2d 804, 808 (8th Cir. 1983)(age discrimination victim "cannot be required to move from his home").

4) Compensatory Damages Include Front Pay To Retirement And Lost Deferred Compensation

123. Damages in age discrimination cases are intended to make a "plaintiff whole, i.e., returning him as nearly as possible to the economic situation he would have enjoyed but for the defendant's illegal conduct." Anderson v. Phillips Petroleum Co., 861 F.2d 631,637 (10th Cir. 1989).

124. Where reinstatement in the position is not feasible, courts award "front-pay," meaning the future income and benefits lost. In the case of persons in their mid-to-late 50's, such as Berry/Spencer, courts routinely award lost future income and benefits through the anticipated retirement age. Padilla v. Metro-North Commuter Railroad, 92 F.3d 117, 125 (2d Cir. 1996), cert. denied, 520 U.S. 1274 (1997)(front-pay award of 20 years, to age 67); Nelson v. Boatmen's Bancshares, Inc., 26 F.2d 796 (8th Cir. 1994)(awarding securities industry plaintiff front-pay to age 65); Fite v. First Tennessee Production Credit Assoc., 861 F.2d 884 (6th Cir. 1988)(awarding front pay to 57 year old to age 65); Davis v.

Combustion Engineering, Inc., 742 F.2d 916, 923 (6th Cir. 1984)(awarding front-pay to 59 year old to age 65).

125. In age discrimination cases, as in other cases under Ohio law, a plaintiff need not prove the measure of compensatory damages to a certainty. Rather, "[w]here the existence of damage is established, the evidence need only tend to show the basis for the computation of damages to a fair degree of probability." Srail v. RJF Int'l Corp., 126 Ohio App.3d 689, 702, 711 N.E.2d 264, 273 (1998).

126. In the case of an employee who loses stock options or similar deferred compensation, the employee is entitled to have those benefits restored, even if the terms of the plan provide that the employee's rights under the plan terminate at the end of employment. Ahern v. Ameritech Corp., supra, 137 Ohio App.3d at 772, 739 N.E.2d at 1196 (affirming award of value of lost stock options, since employee's "unlawful termination made it impossible for him to exercise the stock options," and rejecting employer's reliance on plan language, since an "employer cannot invoke the terms of an agreement that it drained to prevent an employee who it wrongfully terminated from recovering the benefits of the contract").

127. Here, we will ask the arbitrators to award, among the many elements of damages, front pay beyond age 65. Nowadays, it is more common than in the past for brokers to work well beyond age 65, and Berry/Spencer did not, and do not, intend on retiring at age 65.

128. Moreover, we will ask the arbitrators to award Berry/Spencer any and all unvested deferred compensation in the FCCAAP and RMCAAP plans, regardless of the terms of those plans, plus lost future contributions through anticipated

retirement. Respondents, through their unlawful conduct, cost Berry/Spencer several hundred thousand dollars in deferred compensation, and under the authorities cited above, cannot prevent Berry/Spencer from obtaining the deferred compensation they worked to hard to earn.

5) Double Damages And Attorney's Fees

129. The evidence will show a willful intent to discriminate. Accordingly, Berry/Spencer are entitled to double damages, together with attorney's fees and costs. Nelson v. Boatmen's Bancshares, Inc., supra, 26 F.2d at 803-804.

6) Punitive Damages Are Available Based On A Multiple of Compensatory Damages, Or A Portion Of Respondents' Profits

130. In the United States Supreme Court's decision in Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 115 S.Ct. 1212, 1217 (1995), the Supreme Court held that punitive damages were available in arbitration.

131. Under Ohio law, in addition to compensatory damages, punitive damages may be awarded where the conduct was undertaken with "malice." In this context, malice means either "hatred, ill will or a spirit of revenge," or "a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." Id., 137 Ohio App.3d at 776, 739 N.E.2d at 1199. Punitive damages "are awarded for the purpose of punishing the defendant for wrongful conduct and deterring such conduct in the future." Id. In the Ameritech case, the Court found that punitive damages were warranted where

> "once [the supervisor] became a general manager at Ameritech Pay Phone Services, *she fostered an environment in which younger employees engaged in behavior which was inappropriate in a business setting*. The joking and physical contact primarily occurred during after-work gatherings but also were a part of meetings of [the supervisor's] group at work." 137 Ohio App.3d at 781,739 N.E.2d at 1203 (emphasis added).

132. The amount of punitive damages "is within the discretion of the trier of fact." Srail v. RJF Int'l Corp., supra, 126 Ohio App.3d at 703,711 N.E.2d at 274. The amount of punitive damages is unlimited so long as the verdict is not the result of "passion and prejudice" and is not "so excessive it supports a conclusion that the jury was wrongfully influenced." Gollihue v. Consolidated Rail Corp., 120 Ohio App.3d 378, 402, 697 N.E.2d 1109, 1124-1125, appeal dismissed, 80 Ohio St.3d 1444, 686 N.E.2d 273 (1997)(affirming award of punitive damages in the amount of three-times compensatory damages).

133. An award of punitive damages "will not be overturned unless it bears no rational relationship or is grossly disproportionate to the award of compensatory damages." Id. In the Gollihue case, the Court upheld a punitive damage award equal to "one week's net profit" for the corporate defendant.

134. Here, we will ask the arbitrators to award punitive damages in a multiple of compensatory damages. Alternatively, and as authorized by the authority cited above, we will ask the arbitrators to measure punitive damages as a percentage of Merrill Lynch's annual profits. (See also cases

discussed below, in Relief Requested section, and Exhibits 54 and 55 hereto)

B. Retaliation For Objecting To Age Discrimination

135. In addition to outlawing age discrimination, Ohio law provides a cause of action to a person who is the subject of retaliation after objecting to discrimination. Ohio Statutes, §4112.02 provides, in pertinent part, that it is unlawful:

> "(I) For any person to discriminate in any manner against any other person *because that person has opposed any unlawful discriminatory practice* defined in this section. . . ." (Emphasis added)

136. The remedies available to a person subject to retaliation are the same as are available for the underlying discrimination, under Ohio Statutes, § 4112.02(N), quoted above. The case law cited above with respect to the measure of compensatory and punitive damages equally is applicable to this claim, and such case authority will not be repeated for the sake of brevity.

C. Whistleblower Claim (Statutory And Common Law)

137. Berry/Spencer were the subject of retaliation after Berry reported to Merrill Lynch serious regulatory violations by the Woods/DiLauro team, and then objected when it became clear that the issues were not being reported by Merrill Lynch to regulatory authorities. The retaliation was continuous through the date Berry/Spencer were forced to resign.

138. Under the Ohio Whistleblower statute, an employee is protected from retaliation if an employee reports to his employer unlawful conduct by other employees. Ohio Statutes, § 4113.52, provides in pertinent part, as follows:

> "(A)(3) If an employee becomes aware in the course of his employment of a violation by a fellow employee of any federal or state statute, any ordinance or regulation of a political subdivision, or any work rule or company policy of his employer and the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony, the employee orally shall notify his supervisor or other responsible officer of his employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation.
>
> (B) .... No employer shall take any disciplinary or retaliatory action against an employee for making any report authorized by division (A)(3) of this section if the employee made a reasonable and good faith effort to determine the accuracy of any information so reported, or as a result of the employee's having made any inquiry or taken any other action to ensure the accuracy of any information reported under that division. For the purposes of this division, *disciplinary or retaliatory action by the employer includes, without limitation, doing any of the following:*
> (1) Removing or suspending the employee from employment;

(2) Withholding from the employee salary increases or employee benefits to which the employee is otherwise entitled;
(3) *Transferring or reassigning the employee;*
(4) Denying the employee a promotion that otherwise would have been received;
(5) *Reducing the employee in pay or position.*

* * *

(D) If an employer takes any disciplinary or retaliatory action against an employee as a result of the employee's having filed a report under division (A) of this section, the employee may bring a civil action for appropriate injunctive relief or for the remedies set forth in division (E) of this section, or both, within one hundred eighty days after the date the disciplinary or retaliatory action was taken ....

(E) The court ... may order, as it determines appropriate ... the payment of *back wages, full reinstatement of fringe benefits and* seniority rights, or any combination of these remedies. The court also may award the prevailing party all or a portion of the costs of litigation, and if the employee who brought the action prevails in the action, *may award the prevailing employee reasonable attorney's fees, witness fees, and fees for experts* who testify at trial, in an amount the court determines appropriate .... "

139. In addition to this statutory claim, Berry/Spencer have a common law tort claim for retaliation after reporting unlawful conduct. Kulch v. Structural Fibers, Inc., 78 Ohio St.3d 134, 162, 677 N.E.2d 308, 328-329 (1997)("an at-will employee who is discharged or disciplined in violation of

R.C. 4113.52 may maintain a statutory cause of action for the violation, a common-law cause of action in tort, or both, but is not entitled to double recovery").

140. The case law cited above with respect to the measure of compensatory and punitive damages equally is applicable to this claim, and such case authority will not be repeated for the sake of brevity.

D. Wrongful Termination In Violation Of Public Policy

141. In addition to the statutory claim protecting against retaliation, Berry/Spencer have a common law claim for unlawful termination in violation of public policy.

142. Wrongful termination in violation of public policy is a recognized exception in Ohio to the "at-will" employment doctrine (which may not be binding in arbitration anyway, see below). Berge v. Columbus Community Cable Access, 136 Ohio App.3d 281,304, 736 N.E.2d 517, 533), citing, Greeley v. Miami Valley Maintenance Contractors, Inc., 49 Ohio St.3d 228, 234, 551 N.E.2d 981,986 (1990). The elements of the cause of action include (i) a clear public policy evidenced in a state or federal statute, constitution, administrative regulation, or in the common law, (ii) dismissal under the circumstances of the case would jeopardize the public policy, (iii) the dismissal was motivated by conduct related to the public policy, and (iv) there was no legitimate overriding business justification for the dismissal. Id.

143. To satisfy the "dismissal" aspect of the claim, it is not necessary that the employee be fired. The doctrine of "constructive discharge" holds that the employee will be deemed to have been fired, "when the employer's actions

make working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign." Id.

144. The case law cited above with respect to the measure of compensatory and punitive damages equally is applicable to this claim, and such case authority will not be repeated for the sake of brevity.

E. Wrongful Termination

145. Since at least 1981, the federal courts have implied a "for cause" requirement for the termination of securities industry employees, even if state law adheres to the "at-will" employment doctrine. In Shearson Hayden Stone, Inc. v. Liang, 653 F.2d 310 (7th Cir. 1981), the Court held as follows:

> "Shearson's further reply that [the employee's] employment was terminable at will is without merit. *It has been held repeatedly that an agreement to arbitrate disputes about employee discharges implies a requirement that discharges be only for 'just cause'* . . . Since the arbitrators had power under the contract to make that determination, their award must be upheld." (653 F.2d at 312-313; citations omitted, emphasis added.)

146. Similarly, in PaineWebber Inc. v. Agron, 49 F.3d 347 (8th Cir. 1995), the Court held as follows:

> "PaineWebber also contends that the [arbitration] award must be vacated because it manifestly disregards Kansas' *employment at-will doctrine*. This argument overlooks the very nature of this arbitration

> proceeding .... PaineWebber's relationship with [the stockbroker] under the oversight of the NASD contemplated the use of the arbitration procedure as a means of settling employment-related disputes. This process necessarily *alters the employment relationship from at-will to something else -- some standard of discernible cause is inherently required in this context where an arbitration panel is called on to interpret the employment relationship* .... Accordingly, *the arbitration panel had the power to determine whether the firing was justified.* (49 F.3d at 352, emphasis added.)

147. The case law cited above with respect to the measure of compensatory and punitive damages equally is applicable to this claim, and such case authority will not be repeated for the sake of brevity.

F. <u>Deceptive Trade Practices</u>

148. The actions of respondents constitute a deceptive trade practice under Ohio law. Ohio Statutes, §4165.02 provides, in pertinent part, as follows:

> "(A) A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person does any of the following:
>
> * * *
>
> (7) Represents that goods or services have... characteristics ... that they do not have ....
>
> * * *

(10) Disparages the goods, services, or business of another by false representation of fact."

149. Ohio Statutes, § 4165.02 further provides, in pertinent part, as follows:

"(A)(2) A person who is injured by a person who commits a deceptive trade practice that is listed in division (A) of section 4165.02 of the Revised Code may commence a civil action to *recover actual damages* from the person who commits the deceptive trade practice.

(B) The court may award in accordance with this division reasonable attorney's fees to the prevailing party .... An award of attorney's fees may be assessed against a plaintiff if the court finds that the plaintiff knew the action to be groundless. *An award of attorney's fees may be assessed against a defendant if the court finds that the defendant has willfully engaged in a trade practice listed in division (A) ... knowing it to be deceptive.*

(c) The civil relief provided in this section is in addition to civil or criminal remedies otherwise available against the same conduct under the common law or other sections of the Revised Code." (Emphasis added)

150. The case law cited above with respect to the measure of compensatory and punitive damages equally is applicable to this claim, and such case authority will not be repeated for the sake of brevity.

G. Tortious Interference With Business Relations

151. The actions of respondents in interfering with Berry/Spencer' business relations with Berry/Spencer' clients were a tort under Ohio law. Ohio recognized the tort of interference with business relations "when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another . . . ." A&B - Abell Elevator Co., Inc. v. Columbus/Central Ohio Building & Constr. Trades Council, 73 Ohio St.3d 1, 14, 651 N.E.2d 1283, 1294 (1995)(citations omitted).

152. Where a person is privileged to interfere (such as a legitimate business competitor), the actions nonetheless are a tort if undertaken with "actual malice," meaning "with knowledge that the statements are false or with a reckless disregard as to their truth or falsity." Id., 73 Ohio St.3d at 15,651 N.E.2d at 1295.

153. The case law cited above with respect to the measure of compensatory and punitive damages equally is applicable to this claim, and such case authority will not be repeated for the sake of brevity.

H. Defamation

154. In the course of trying to convince customers not to deal with Berry/Spencer, numerous Merrill Lynch brokers acting under the direction of Inhouse made false statements to customers that Berry/Spencer were planning on retiring soon. These false statements of fact were made for the purpose of damaging Berry/Spencer professional standing with the clients, in the hope that Clients would not want to transfer their accounts to persons who would be retiring soon. These

statements, however, knowingly were false, as Berry/Spencer had already rejected numerous attempts by Inhouse and others at Merrill Lynch to convince Berry/Spencer to retire.

155. These false statements by Merrill Lynch were defamatory. Defamation is "a false and malicious publication against an individual made with intent to injure his reputation or to expose him to public hatred, contempt, ridicule, shame, or ~~disgrace or~~ to affect him injuriously in his trade, business or profession." Robb v. Lincoln Publishing (Ohio), Inc., 114 Ohio App.3d 595, 616, 683 N.E.2d 823, 837 (1996).

156. Words that "tend to injure one in one's trade or occupation" are *defamatory per se,* and the plaintiff need not prove actual damages. The damage from such words is presumed as a matter of law. Leal v. Holtvogt, 123 Ohio App.3d 51, 82, 702 N.E.2d 1246, 1266 (1998).

157. The case law cited above with respect to the measure of compensatory and punitive damages equally is applicable to this claim, and such case authority will not be repeated for the sake of brevity.

158. Additionally, while a plaintiff is not required to prove actual damages in order to obtain an award of compensatory damages for defamation, if a plaintiff does prove actual damages, the plaintiff is entitled to punitive damages as well. Alternatively, punitive damages may be awarded if the plaintiff shows that the words were spoken with "malice," meaning "anger, hatred, ill will, a spirit of revenge, or a reckless disregard of the consequences or the legal rights of others." Id., 123 Ohio App.3d at 82, 702 N.E.2d at 1266 ("To receive punitive damages on a claim for defamation *per se,* one must separately prove either actual damages or show that the other party acted with actual

malice"); see also, Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132 (6th Cir. 1996)(confirming NASD arbitration award granting broker $750,000 in punitive damages for firm's defamatory entry on Form U-5).

RELIEF REQUESTED

159. Berry/Spencer seek legal and equitable relief to remedy the injustice that has been done to Berry/Spencer. The arbitrators have the inherent authority to fashion a fair remedy that best suits the needs of this case. In Advest, Inc. v. McCarthy, 914 F.2d 6 (1st Cir. 1990), the United States Court of Appeals reiterated the broad authority of arbitrators to fashion an equitable remedy:

> ". . . the level of deference accorded an arbitrator's selection of remedies is much greater than that accorded a constitutional court. . . . [A]rbitrators possess latitude in crafting remedies as wide as that which they possess in deciding cases . . . . That leeway is at its zenith when, as here, the arbitration clause imposes no limitations on the choice of remedies . . . ." (Id., at 10-11)

160. Attached hereto as Exhibit 54 is a copy of a recent NASD arbitration decision bearing facts remarkably similar to this case. In Sawtelle v. Waddell & Reed, Inc., (NASD No. 99-5327), the broker managed to keep the bulk of his business through his dogged determination, despite dirty tricks by the fn-m similar to those of Merrill Lynch here. In Sawtelle, the firm

> "orchestrated a campaign of deception which included, among other things, giving the impression to clients that: Claimant had mishandled their investments,

> Claimant was untrustworthy, Claimant no longer was in business, Claimant was not authorized to do business, and Claimant was in some way involved with the embezzling of client funds. The Panel also found that Waddell & Reed, through its agents, re-routed Claimant's mail and his telephone lines, as a result, telephone calls and mail intended for Claimant were received by Waddell & Reed and its agents."

161. The conduct of Merrill Lynch with regard to Berry/Spencer is remarkably similar to the conduct of Waddell & Reed with regard to broker Sawtelle. The NASD arbitrators in the Sawtelle case awarded $2 million compensatory damages, and punitive damages of $25,000,000. When the Arbitrators hear what happened to Berry/Spencer, and the bullying behavior of Merrill Lynch and Inhouse, the arbitrators will find that a similar award is warranted in this case to punish and deter Merrill Lynch and Inhouse from treating others in such an unlawful and unjustified manner. See also, Acciardo v. Millenium Securities Corp., 83 F.Supp.2d 413 (S.D.N.Y. 2000)(upholding NASD arbitrators' award of punitive damages in the multiple of 20 times compensatory damages)(Exhibit 55 hereto).

WHEREFORE, Berry/Spencer Robert W. Berry and Diane L. Spencer respectfully request that the arbitrators enter an award in favor of Berry/Spencer, dismissing the Statement of Claim in its entirely, and entering an award on the Counterclaims and Third-Party Claims against respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and John J. Inhouse III, jointly and severally, awarding Berry/Spencer:

A. Compensatory damages in an amount to be presented at the hearings, in excess of $2 million;

B. Double damages;

C. Punitive damages in either a multiple of compensatory damages or based upon respondent Merrill Lynch's profits, in an amount adequate to serve as a punishment and deterrent to respondents, in light of respondents' ability to pay;

D. Costs, including reasonable attorney's fees; and

E. Such other and further relief as the arbitrators deem just, including an allocation of all NYSE forum fees against Merrill Lynch and Inhouse.

REQUEST FOR DISCIPLINARY REFERRAL

In addition to the monetary relief sought above, Berry/Spencer request that the Arbitrators make a disciplinary referral to the NASD and the Enforcement Department of the New York Stock Exchange, Inc., of Merrill Lynch, Inhouse, and other responsible members of Merrill Lynch management, pursuant to NASD Code of Arbitration Procedure, § 10106, based upon such persons failure timely to report to the NASD the Hargreaves customer complaint and settlement, and their praeti6e of characterizing settlements of customer complaints as non-reportable "wade errors."

Dated: October 15, 2001

Respectfully Submitted,
/s/
William A. Jacobsen, Esq.
Kaplan & Jacobson Inc.
1100 Turks Head Building
Providence, RI 02903
Tel. 401-272-9000

Fax. 401-272-9020

-and-

Kenneth A. Bravo (0014274)
Matthew J. Morelli (0063738)
ULMER & BERNE LLP
1300 East Ninth Street,
Suite 900
Cleveland, Ohio 44114
Tel. 216-621-8400
Fax. 216-621-7488

Attorneys for Berry/Spencer

CERTIFICATION OF SERVICE

On this 15th day of October, 2001, I served the original and three copies of the foregoing, by Federal Express, upon:

Jeffrey Dean, Esq.
NASD Dispute Resolution, Inc.
10 South LaSalle Street, Suite 1110
Chicago, IL 60603-1002

With copies, by Federal Express, upon:

David F. McComb, Esq.
Rubin & Associates, P.C.
10 South Leopard Road
Paoli, PA 19301

William H. Falin, Esq.
Moscarino & Treu
1422 Euclid Avenue, Suite 630
Cleveland, OH44115

/s/_____

ULMER BERNE LLP
ATTORNEYS AT LAW

Penton Media Building
1300 East Ninth Street, Suite 900
Cleveland, Ohio 44114-1583
Fax (216) 621-7488

(216) 621-8400
July 22, 2002

Ohio Civil Rights Commission
Cleveland Regional Office
615 West Superior Avenue
Suite: 885
Cleveland, Ohio 44113

Attention: Freedom of Information Officer

Re: Daniel G. Zeiser, formerly employed at KeyBank National Association

Gentlemen:

We are writing pursuant to the Ohio Public Records Act, R.C. § 149.43, to request that yore office provide us with copies of all documents within your agency's possession, custody or control which refer, relate or in any pertain to the captioned individual. It is our understanding that an employee of KeyBank National Association filed a charge of discrimination which named, probably in addition to the Bank, Mr. Zeiser. Our request includes this specific matter as well as any others which mention Mr. Zeiser.

Anything you could do to expedite your processing of this request would be sincerely appreciated. We are, of course, prepared to reimburse you for any out-of-pocket expenses you incur in providing the requested materials. If you anticipate that the cost will exceed $100.00, we would appreciate the courtesy of a call before any expense in excess of that amount is incurred.

If you have any questions concerning this matter, we would welcome hearing from you.

Very truly yours,
/s/
Kenneth A. Bravo

Enclosure
cc: William A. Jacobson, Esq. (via fax & mail)

ULMER BERNE LLP
ATTORNEYS AT LAW

Penton Media Building
1300 East Ninth Street, Suite 900
Cleveland, Ohio 44114-1583
Fax (216) 621-7488

(216) 621-8400

July 22, 2002

Equal Employment Opportunity Commission
Cleveland District Office
1660 West 2nd Street
850 Skylight Tower
Cleveland, Ohio 44113-1454

Attention: Freedom of Information Officer

Re: Daniel O. Zeiser, formerly employed at KeyBank National Association

Gentlemen:

We are writing pursuant to the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, to request that your office provide us with copies of all documents within your agency's possession, custody or control which refer, relate or in any pertain to the captioned individual. It is our understanding that an employee of KeyBank National Association filed a charge of discrimination which named, probably in addition to the Bank, Mr. Zeiser. Our request includes this specific matter as well as any others which mention Mr. Zeiser.

Anything you could do to expedite your processing of this request would be sincerely appreciated. We are, of course, prepared to reimburse you for any out-of-pocket expenses you incur in providing the requested materials. If you anticipate that the cost will exceed $100.00, we would appreciate the courtesy of a call before any expense in excess of that amount is incurred.

If you have any questions concerning this matter, we would welcome hearing from you.

Very truly yours,

/s/_____
Kenneth A. Bravo

cc: William A. Jacobson, Esq. (via fax and mail)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Cleveland District Office

C. LARRY WATSON
REGIONAL ATTORNEY

August 20, 2002

Kenneth A. Bravo
ULMER & BERN, LLP.
Penton Media Bldg, Suite 900
1300 East Ninth Street
Cleveland, Ohio 44114-1583

Re: Daniel G. Zeiser
FOIA Request No. A2-10-435CL

Dear Mr. Bravo:

Your request, pursuant to the Freedom of Information Act (FOIA), seeking documents related to Daniel G. Zeiser can neither be granted nor denied. We have no record of any charge filed by or against Mr. Zeiser.

You should also know that Commission documents are only available to a Charging Party who has an unexpired Right to Sue or who has filed a lawsuit based on his/her charge. A Respondent may receive a charge file once it has been sued based on that charge.

Should you have any questions regarding this matter please feel free to contact me.

Very truly yours,
/s/
C. Larry Watson
Regional Attorney

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5.01 CV 1357

MERRILL LYNCH, PIERCE, FENNER,)
& SMITH INCORPORATED)
Plaintiff,)
)
-vs-)
)
ROBERT W. BERRY, et al.,)
Defendants.)
)

BEFORE: JUDGE JAMES S. GWIN

AFFIDAVIT OF WILLIAM A. JACOBSON

STATE OF RHODE ISLAND)
) .ss:
PROVIDENCE COUNTY)

WILLIAM A. JACOBSON, being duly sworn, deposes and says:

1. I am an attorney admitted to the Bars of the States of Rhode Island and New York, and the Commonwealth of Massachusetts.

2. I served as co-counsel of record for Robert W. Berry ("Berry") and Diane L. Spencer ("Spencer")(collectively, the "Moving Parties") in the arbitration captioned Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Robert W. Berry, Diane L. Spencer and First Union Securities Inc. v. John Inhouse (NASD Case No. 01-02983)(the "Arbitration"), held under the auspices of the National Association of Securities Dealers, Inc. (the "NASD"), as directed by this Court in its Orders, dated June 6, 2001, and June 22,2001.

3. Daniel G. Zeiser ("Zeiser") was Chairman of the arbitration panel in the Arbitration. At no time before, during, or after, the evidentiary hearings did Zeiser disclose (a) that Zeiser was a party plaintiff in a lawsuit being defended Edward Simms, an associate of my co-counsel, Kenneth A. Bravo of Ulmer & Berne LLP, or (b) that Zeiser himself had been named as a defendant in a discrimination suit. Had any disclosure been made of either of these items, the Moving Parties' would have challenged Zeiser's appointment to the panel of arbitrators on behalf of the Moving Parties.

4. I did not learn that Zeiser himself had been named as a defendant in a discrimination suit until July 19, 2002, when I received a copy of a New York Stock Exchange, Inc. ("NYSE") disclosure statement issued by Zeiser unrelated to the Arbitration. A copy of Zeiser's NYSE disclosure statement is annexed as Exhibit A hereto.

5. In Zeiser's NYSE disclosure statement, Zeiser discloses (but never disclosed in the Arbitration) that Zeiser himself had been named as a defendant in a discrimination lawsuit. The Arbitration involved substantial counterclaims of discrimination brought by the Moving Parties, and it certainly would have been material to know that the Chairman of the panel was, or recently had been, a defendant in a

discrimination suit. Had Zeiser disclosed that he had been a defendant in a discrimination suit, the Moving Parties would have requested that Zeiser be removed from the arbitration panel.

6. Aider receiving Zeiser's NYSE disclosure statement on July 19, 2002, I forwarded a copy to my co-counsel, Kenneth Bravo. I also began to investigate public sources of information in an attempt to find some case-reference to the discrimination suit in which Zeiser had been a defendant.

7. On August 9, 2002, I checked the public website for the Cuyahoga County Court of Common Pleas, which permits name searches. By doing a name search for Zeiser, I was able to obtain a printout of the docket sheet and party information sheet in a case captioned Marvin J. Feldman et al. v. Ameritech et al. (the "Common Pleas Lawsuit"). A copy of this printout is attached as Exhibit B hereto. As reflected therein, Zeiser is a named party plaintiff in the Common Pleas Lawsuit.

8. As shocked as I had been to discover Zeiser's non-disclosure of his own discrimination suit, I was equally surprised to learn that one of the attorneys defending the Common Pleas Lawsuit was an associate of Mr. Bravo at Ulmer & Berne. Zeiser had disclosed during the Arbitration that he had worked with Ulmer & Berne years earlier when Zeiser was at KeyBank, but had not disclosed this obvious conflict. Had Zeiser disclosed that an attorney at Mr. Bravo's firm had defended the Common Pleas Lawsuit, the Moving Parties would have requested Zeiser's removal from the arbitration panel.

/s/
William A. Jacobsen

Sworn to before me this
1st day of October, 2002

/s/_____
Notary Public

MY COMMISSION EXPIRES 07/27/06

N.Y.S.E. ARBITRATOR PROFILE

Name: Zeiser, Daniel G.

Current Position: Attorney at Law
Employer's Name: Daniel G. Zeiser Co., L.P.A.
Employer's Address:
P.O. Box 43280
Cleveland, OH 44143-0820
Office Telephone: (440)449-9311
Fax: (440) 449-9311

Home Telephone: (440) 449-1391
Home Address:
5877 Williamsburg Drive
Cleveland, OH 44143-20201

Social Security No.: 298-62-0483
CRD No.:
Classification: SECURITIES (See Guidelines for clarification)

Employment History:
Daniel G. Zeiser, Attorney at Law/Sole Proprietor
1999 to date
Keybank National Association,
Vice President & Assoc. Counsel
1992 to 1999
Leaseway Transportation Corp., Labor Counsel
1988 to 1992
Sanford Gross Co. LPA, Associate
1984 to 1988

Educational Background:

JD - Case Western Reserve Univ.School
of Law - 1984
AB- Kenyon College -1981

Bus./Prof. Background:

I am an attorney, arbitrator, and mediator with over 15 years experience in labor and employment, particularly in the financial industry. From 1992-1999, I was employed by KeyBank National Association. KeyBank has an investment affiliate, McDonald Securities, fka Key Investments, Inc. During my employment with KeyBank, I handled a number of matters for Key Investments.

Arbitration Experience:

I am an arbitrator on the panels of the American Arbitration Association, the Federal Mediation and Conciliation Service, the National Association of Securities Dealers, the New York Stock Exchange, the Chicago Stock Exchange, the Chicago Mercantile Exchange, the National Futures Association, and the Council of Better Business Bureau. I am a mediator with the NASD, the U.S. District Court, N.D. Ohio, the Better Business Bureau, end the National Employment Mediation Services.

Arbitrator Training: 9/13/00 NYSE, Interactive Workshop
8/00 Council of Better Business Bureaus
6/00 NASD Panel Member arbitrator training

11/99 Labor Arbitrator Training, FMCS Institute
6/18/199 Labor Law and Labor Arbitration, Labor Arbitration Institute
10/16/99 Labor Law and Labor Arbitration. Labor Arbitration Institute
9/23/97 Avoiding Employment Litigation, American Arbitration Association
5/9/97 Advocates and Practitioners in ADR, Ohio CLE Institute

Prof. & Bus. Ass'ns: American Bar Association, Ohio State Bar Association, Cleveland Bar Association, American Arbitration Association, Industrial Relations Research Association, Public Sector Labor Relations Association, Association for Conflict Resolution.

Brokerage Accounts:

Donaldson, Lufkin & Jenrette
Key Investments, Inc.
Solomon Smith Barney

Brokerage Firms with whom you, your employer or family have or have had a relationship within the last five years:

none

Willing to serve as arbitrator at other sell-regulatory organizations?: Yes

Regulatory/criminal history? (Y/N): Yes

Explanation: I was named in a charge of discrimination by a former employee of KeyBank National Association alleging that I was involved in the decision to terminate his worker's compensation and disability benefits. The charge was resolved with no finding against me.

Last Training Session: 09/13/2000
Last Evaluation:
Able to Chair?: No
Last CRD: 01/19/2000

Regions Available:

Cincinnati, OH
Cleveland, OH
Detroit, MI
Pittsburgh, PA

Last Revised: 04/19/2002

I swear or affirm that the above information is true end complete to the best of my knowledge. I understand that I am responsible for advising the N.Y.S.E. of any changes to the above information end that the information provided is subject to independent verification. I also hereby agree that if 8ppolmed, I shall serve in accordance with established NYSE procedures, NYSE Arbitration Rules end the Code of Ethics for Arbitrators in Commercial Disputes. I understand that my submission of this information does not create any obligation on the part of the NYSE to place me on the list of persons eligible to serve as arbitrators on arbitrations organized and conducted by the NYSE or to appoint me to serve on any panel of arbitrators; I also understand that the NYSE reserves

the right to reconsider the eligibility or appointment of arbitrators at any time and to remove arbitrators as it in its sole judgement deems appropriate.

_____ _____

Signature Date

[FOLDOUT EXHIBIT]

CUYAHOGA COUNTY, OHIO
COURT OF COMMON PLEAS

DOCKET SHEET

CASE NO: CV-00-413513

Cuyahoga County, Ohio
Clerk of Courts
Court of Common Pleas

Case Parties

Case Summary | Docket | Costs | Service | New Search | Exit

Case Number: CV-00-413513
Case Title: MARVIN J FELDMAN ET AL vs. AMERITECH-ET AL

PLAINTIFF (1)	MARVIN J FELDMAN 1104 THE SUPERIOR BLDG 815 SUPERIOR AVENUE NE CLEVELAND, OH 44114-0000	ATTORNEY CLARK D RICE (0025128) 1280 WEST THIRD STREET 2ND FLOOR CLEVELAND, OH 44113-0000 N/A Answer filed: N/A
PLAINTIFF (2)	DANIEL G ZEISER 1104 THE SUPERIOR BLDG 815 SUPERIOR AVENUE NE CLEVELAND, OH 44114-0000	ATTORNEY CLARK D RICE (0025128) 1280 WEST THIRD STREET 2ND FLOOR CLEVELAND, OH 44113-0000 N/A Answer filed: N/A
DEFENDANT (1)	AMERITECH-ET AL 45 ERIEVIEW PLAZA CLEVELAND, OH 44114-0000	ATTORNEY CYNTHIA C SCHAFER (0037226) 45 ERIEVIEW PLAZA STE 1400 CLEVELAND, OH 44114-0000 N/A Answer filed: N/A
DEFENDANT (2)	AT & T 295 NORTH MAPLE AVENUE BASKING RIDGE, NJ 07920-0000	ATTORNEY EDWARD P SIMMS (0069173) BOND COURT BLDG 1300 E 9TH ST SUITE 900 CLEVELAND, OH 44114-1583 N/A Answer filed: N/A

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Cuyahoga County, Ohio
Clerk of Courts
Court of Common Pleas

Case Docket Listing

Case Summary | Case Parties | Costs | Service | New Search
Printer Friendly | Print Docket | Exit

Case Number: CV-00-413513
Case Title: MARVIN J FELDMAN ET AL vs. AMERITECH-ET AL
Tiff Viewer: AlternaTIFF

From Date | Sort | Type | Type | Type | Type | Search

O Ascending
◉ Descending

Start Search

Date	Side	Type	Description	Image
07/12/2001	D	CS	CLERK FEE.....$ 56.20 PD SHERIFF FEE.....$ LEGAL NEWS.....$ 10.00PD LEGAL NEWS ABSTRACT....$ PRINTER FEE.....$ COMPUTER RESEARCH.....$ 3.00 PD LEGAL AID FEE.....$ 15.00 PD CLERK COMPUTER FEE.....$ 10.00 PD TOTAL.....$ 94.20 7-11-01 COST PD BY AT & T $94.20 CB 122-61-32 REFUND PA 7-11-01 DEP APL 37.00 CB122-61-33/SMM	N/A
07/03/2001	P	OT	DISMISSAL ENTRY...CLARK D. RICE.	N/A
06/20/2001	P	JE	ARBITRATION APPEAL DE NOVO FILED BY DEFT AS OF 4-11-01. APPEAL MEDIATION MEETING HELD ON 6-18-01. CASE SETTLED AT APPEAL MEDIATION MEETING. STIPULATION: CONSENT JE. CASE S&D W/PREJ. COSTS TO AT&T. SETTLED AT A HEARING IN THE OFFICE OF ADR. THIS IS A COMPLETE RELEASE OF MARVIN FELDMAN OF AT&T AND ITS FAMILY OF COMPANIES, INCLUDING TELEPORT COMMUNICATIONS GROUP. ALL CLAIMS AND CAUSES OF ACTION. ALLEGED OR THAT COULD BE ALLEGED ARE FOREVER RELEASED AS OF JUNE 18, 2001. ATT HAS UNTIL JULY 15, 2001 TO PAY $850.0 + COSTS. (COURT COSTS UPON TO $150.00)...FINAL....OSJ VOL 2610 PG 0313....NOTICE ISSUED CASE DISPOSED BY ARBITRATION DECREE 06/20/01	N/A
04/11/2001	D	OT	AT&T CORP.'S NOTICE OF APPEAL AND DEMAND FOR TRIAL DE NOVO.....EDWARD P. SIMMS.....	N/A
04/11/2001	D	OT	$250.00 ARB ULMER BERNE CB 121-134-32 CY	N/A
03/19/2001	P	OT	REPORT & AWARD OF ARBITRATORS--031901 #69080..	N/A
12/06/2000	P	JE	CASE REFERRED TO ARBITRATION. HEARING SHALL BE CONDUCTED ON OR BEFORE 2/28/01... VOL.2534 PG.0570 NOTICE ISSUED. CASE REFERRED TO ARBITRATION 12/06/00	N/A
10/03/2000	P	SR	CERTIFIED MAIL RECEIPT NO. 013-89930 NOT RETURNED BY U.S. POST OFFICE 10/03/2000. AT & T --- POSTAGE AMOUNT $4.50 POSTCARD NOTICE $.20	N/A
09/29/2000	D	AN	ANSWER OF DEFT AT&T CORP.....EDWARD P. SIMMS	N/A
09/26/2000	P	JE	CMC HELD. SETTLEMENT CONFERENCE SET 11/30/00 AT 10:00. ALL PARTIES WITH FULL AUTHORITY SHALL BE	N/A

		PRESENT...VOL. 2508...PG 0886.. NOTICE ISSUED. CASE SET FOR SETTLEMENT CONF 11/30/00 SC-10:00	
09/19/2000 D	JE	DEFT AT & T CORPORATION'S MOTION FOR EXTENSION OF TIME TO PLEAD OR MOVE IN RESPONSE TO PLTF'S COMPLAINT FILED 8/31/00 IS GRANTED. DEFT SHALL HAVE UNTIL 9/29/00 TO PLEAD OR MOVE PER STIPU- LATION FILED 09/14/00..... VOL.2506 PG.0646 NOTICE ISSUED.	N/A
09/14/2000 P	OT	STIPULATION FOR EXTENSIONOF TIME FOR AT&T CORPORATION TO PLEAD OR MOVE IN RESPONSE TO PLTFS' COMPLAINT UNTIL 9-29-00....EDWARD P. SIMMS. .	N/A
09/13/2000 D	AN	ANSWER AND DEFENSES OF DEFT AMERITECH CORP. CYNTHIA SCHAFER.....	N/A
09/12/2000 P	ZZ	PURSUANT TO LOCAL RULE 21, TELEPHONE CASE MANAGEMENT CONFERENCE SET FOR 09/25/00 AT 10:45 A.M. . PLTF'S COUNSEL SHALL INITIATE CONFERENCE CALL WITH ALL OTHER PARTIES AND CONTACT THE COURT AT THE APPOINTED HOUR (216)443-8699. PARTIES SHALL BE PREPARED TO DISCUSS DISCOVERY PROGRESS AND SCHEDULING MATTERS, ETC.	N/A
08/31/2000 D	OT	NOTICE OF APPEARANCE OF ATTY EDWARD P. SIMMS FOR DEFT. AT & T CORP. .	N/A
08/31/2000 D	MO	DEFT AT & T CORP'S MTN FOR EXTENSION OF TIME TO PLEAD OR MOVE IN RESPONSE TO PLTFS' COMPLAINT...EDWARD P. SIMMS 09/15/00-GRANTED	N/A
08/30/2000 D	OT	STIPULATION FOR LEAVE TO PLEAD THAT AMERITECH HAVE UNTIL 9/13/00.....CYNTHIA C. SCHAFER....	N/A
08/02/2000 P	SR	CERTIFIED MAIL RECEIPT NO. 013-89929 RETURNED BY U.S. POSTAL DEPARTMENT 08/04/2000 AMERITECH-ET AL . MAIL RECEIVED AT ADDRESS 08/02/2000 SIGNED BY OTHER POSTAGE AMOUNT $4.50	N/A
07/21/2000 P	DP	$$ 326243 KOETH,RICE & PELSOZY 100.00 DR 37.00 7-11-01 APL. CF 25.00 . LA 15.00 . LN 10.00 . LR 3.00 . CM 10.00 .	N/A
07/21/2000 P	CO	COMPLAINT WITH JURY DEMAND FILED AND SUMMONS SENT BY CERTIFIED MAIL TO THE DEFENDANT(S).	N/A

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APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5.01 CV 1357

MERRILL LYNCH, PIERCE, FENNER, & SMITH INCORPORATED Plaintiff, -vs- ROBERT W. BERRY, et al., Defendants.	)

BEFORE: JUDGE JAMES S. GWIN

AFFIDAVIT OF EDWARD P. SIMMS

STATE OF OHIO)
) ss:
CUYAHOGA COUNTY)

EDWARD P. SIMMS, being duly sworn, deposes and says:

1. I am an attorney admitted to the Bar of the State of Ohio. I am an associate in the litigation department of the law firm of Ulmer & Berne LLP.

2. I served as counsel of record for AT&T Corp. in the matter of Marvin J. Feldman et al. v. Ameritech et al. (the "Common Pleas Lawsuit"). Daniel G. Zeiser was a named plaintiff in the Common Pleas Lawsuit, and participated during 2000-2001 in various aspects of the case as a plaintiff, including attendance at an arbitration.

3. At no time prior to August 2002 was I aware that Mr. Zeiser was an arbitrator in a case being handled by Kenneth Bravo, Esq. of Ulmer & Berne.

/s/
Edward P. Simms

Sworn to before me this
28th day of October, 2002

/s/
Notary Public

Rose M. Sisson
Notary Public, State of Ohio

Supreme Court, U.S.
FILED
AUG 26 2004
OFFICE OF THE CLERK

No. 04-143

In The Supreme Court of the United States

ROBERT W. BERRY; DIANE L. SPENCER,

Petitioners,

v.

MERRILL LYNCH, PIERCE, FENNER and SMITH INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL J. FORTUNATO*
DAVID F. MCCOMB
RUBIN, FORTUNATO, HARBISON & DOUGHERTY, P.C.
10 South Leopard Road
MCS Building
Paoli, Pennsylvania 19301
(610) 408-2005

Attorneys for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Court should decline to review an unpublished decision of the court of appeals denying equitable tolling of the three-month time limitation in the Federal Arbitration Act for serving a motion to vacate where there is no circuit conflict and the court below held that the case did not merit equitable tolling because petitioners had not acted diligently to protect their rights?

CORPORATE DISCLOSURE STATEMENT

Respondent, Merrill Lynch, Pierce, Fenner & Smith Incorporated, is a wholly-owned subsidiary of Merrill Lynch & Co., a publicly traded company.

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COUNTER-STATEMENT OF THE CASE

Petitioners are former Financial Advisors with Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") who resigned to work for a competitor firm and violated their restrictive covenant agreements not to solicit Merrill Lynch clients. Merrill Lynch sought and obtained injunctive relief against them in the United States District Court for the Northern District of Ohio, and the matter then proceeded to mandatory arbitration before the National Association of Securities Dealers ("NASD"). On March 4, 2002, after seven days of hearings before an NASD panel of arbitrators, the panel ruled in favor of Merrill Lynch on its injunctive and damages claims against petitioners and in favor of petitioner Robert Berry on one of his counterclaims. Petitioners' App. 17a.

Thereafter, on October 2, 2002, almost seven months later, petitioners filed in the district court a motion to vacate the arbitration award, asserting "evident partiality" under Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, on the part of one of the arbitrators. Petitioners' App. 44a. The district court denied the motion because it was filed well past the three-month period set out in Section 12 of the FAA, 9 U.S.C. § 12, and denied petitioners' request for equitable tolling of the three-month time limitation. Petitioners App.12a

On appeal to the United States Court of Appeals for the Sixth Circuit, petitioners contended that their delay in filing the motion to vacate should be excused under the doctrine of equitable tolling. While petitioners pointed to nothing in the arbitration record demonstrating "evident partiality" by the arbitrator in question, they insisted that two "facts" not disclosed by him in the NASD prehearing

disclosure forms showed that he was, in fact, biased either against petitioners, or their counsel.

Petitioners alleged that the arbitrator failed to disclose that (1) he once had been adverse as a party to petitioner's counsel in a municipal court proceeding; and (2) he had been named in a charge of discrimination involving a worker's compensation claimant while he was employed as an in-house lawyer for a local bank several years earlier. From these facts, petitioners fashioned the argument that the arbitrator was hostile both to petitioners' counsel and to at least some of petitioners' counterclaims of employment discrimination.

In a *per curiam* opinion, the court of appeals dismissed petitioners' allegations of arbitrator bias, calling them "slight and speculative" and noted that the arbitrator was not charged with colluding with the parties. Petitioners' App. 10a. Holding that petitioners were not entitled to invoke the equitable tolling doctrine, the court of appeals stressed that petitioners had not acted diligently in the matter:

- "This court will not encourage strategic negligence by arbitrants"
- "Defendants clearly failed to research [arbitrator] Zeiser diligently in general, and so did not come to this equitable table with clean hands" and
- "[t]he statutory period cannot be equitably tolled, because [defendants] failed to safeguard their rights diligently." *Id.* at 9a-10a.

A concurring judge opined that, while there may be instances where the three-month period of Section 12

should be equitably tolled, "[d]efendants have failed to make out a case for equitable tolling." *Id.* at 11a.

Petitioners do not challenge the court of appeals' conclusion about their lack of diligence or their lack of entitlement to equitable tolling. Rather, they sprinkle the petition with various quotations from other courts of appeals as to whether equitable tolling generally is available under the FAA, and then maintain that "this mix of authority leaves a great deal of uncertainty in the lower courts as to whether equitable tolling may be raised with regard to the three month time limitation in 9 U.S.C. § 12 . . . and this Court should decide this issue once and for all . . . " Petition at 10.

REASONS FOR DENYING THE WRIT

A. There is No Split Among the Circuits.

This is a garden-variety equitable tolling case. There is no circuit conflict. No reported district court or court of appeals decision ever has held equitable tolling applicable to the filing of a motion to vacate under the FAA, and this Court previously has declined to address the issue. *See, e.g., Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851, 854 (11th Cir.) (rejecting appellant's argument for a judicially-created due diligence exception to three-month period of Section 12), *cert. denied*, 490 U.S. 1107 (1989) Thus, contrary to the hyperbole of the petition, there is no uncertainty in the lower courts as to whether equitable tolling applies to such motions, and the petition represents nothing more than an ill-considered request for an advisory opinion.

The FAA, 9 U.S.C. § 1 et seq., provides "the exclusive remedy for challenging acts that taint an arbitration award" issued following arbitration conducted under a valid agreement to arbitrate. Section 12 of the FAA provides that "[n]otice of a motion to vacate, modify or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12.

In addressing motions to vacate arbitration awards, the lower courts consistently have emphasized the need for speed and finality of arbitral decisions. *See, e.g.*, *Fradella v. Petricca*, 183 F.3d 17 (1st Cir. 1999) (court did not address whether there could be equitable tolling because appellant did not establish that he was misled by NASD or by appellee); *Lander Co. v. MMP Investments, Inc.*, 107 F.3d 476, 478 (7th Cir.), *cert. denied*, 522 U.S. 811 (1997); *Professional Administrators Ltd v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639, 642 (6th Cir. 1987) ("if a defendant has important defenses to an arbitration award he should raise them within the period prescribed for actions to vacate"); *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986) (court need not consider equitable tolling because appellant had not shown he was prevented from filing during the three-month period of Section 12); *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 177 (2d Cir. 1984) (party may not move to vacate after three months because arbitration's role as "mechanism for speedy dispute resolution disfavors delayed challenges to validity of an award"); *Piccolo v. Dain Kalman & Quail*, 641 F.2d 598, 600 (8th Cir. 1981) ("party to an arbitration award who fails to comply with the statutory precondition of timely service of notice forfeits the right to judicial review of the award"); *Hobet Mining Inc. v. United Mine Workers*, 877 F. Supp.

1011, 1017-18 (S.D.W.Va. 1994) ("section 12 neither expressly nor implicitly ... allows of any exceptions"); *Pennsylvania Engineering Corp. v. Islip Resource Recovery Agency*, 714 F. Supp. 634, 638 (E.D.N.Y. 1989) ("no common law exceptions to FAA to allow for equitable tolling").

While identifying the concerns for speed and finality of arbitral decisions, the court of appeals here recognized that the pro-arbitration policies of the FAA should not be used to justify a fundamentally unfair process, citing this Court's decision in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (arbitration decision procured by party through fraud or arbitrator's dishonesty not enforceable). Petitioner's App. at 8a-9a. The court of appeals, however, did not reach a decision as to whether or under what circumstances equitable tolling of the limitations period for a motion to vacate would be justified because it found insufficient diligence by petitioners to invoke the doctrine's protection in any event. *Id.*[1]

[1] In *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988), the Sixth Circuit set out the following factors generally considered in applying the equitable tolling doctrine: (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement. The court of appeals held that a party's lack of diligence could be dispositive, citing *Irwin v. Dept. of Veteran's Affairs*, 498 U.S. 89, 96 (1990). Petitioners' App. at 9a.

B. The Sixth Circuit Held That the Facts of This Case Did Not Merit Equitable Tolling

The court of appeals determined that it did not need to reach a decision on whether the equitable tolling doctrine ever could be applied to a motion to vacate an arbitration award because it found that petitioners did not act with the diligence necessary to invoke such an extraordinary remedy. Indeed their petition does not even dispute that conclusion.

The court of appeals' thoughtful discussion of the FAA's balancing of speed and finality considerations on the one hand, and arbitral fairness on the other hand, does not demonstrate a circuit conflict, but rather is *dictum* that, under the right circumstances, it might consider equitable tolling. The court of appeals concluded, however, that this is not the appropriate case for it because petitioners failed to act diligently in discovering the facts underlying their motion.

As the Court explained in *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 96 (1990), equitable tolling has been permitted where "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence."

The court of appeals' conclusions about the lack of diligence are unassailable. Petitioners' counsel easily could have acquired information about the arbitrator in question

in advance of the arbitration but failed to do so.[2] Given the "slight and speculative" nature of the petitioners' nondisclosure arguments concerning the arbitrator, petitioners' failure to raise these issues prior to, or at the arbitration hearing, must be deemed to be "strategic negligence."[3]

Under these circumstances, *i.e.*, where the court of appeals found that the case did not merit equitable tolling in any event, the first and second questions presented in the petition are nothing more than requests for an advisory opinion. The Court exercises its power "to correct wrong judgments, not revise opinions. If the same judgment would be entered by the [lower] court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion." *Herb v.*

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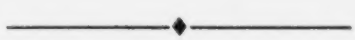
[2] NASD arbitration rules expressly allow for the striking of an arbitrator for cause. NASD Uniform Code of Arbitration, Rule 10311 ("There shall be unlimited challenges for cause"). Had petitioners acted with due diligence, and had they truly believed that the arbitrator would be biased unfavorably from prior dealings, they could have struck him. The arbitration panel was appointed in June 2001 and hearings did not occur until January 2002.

[3] In prior decisions, the Sixth Circuit has held that "to invalidate an arbitration award on grounds of bias [or evident partiality], the challenging party must show that 'a reasonable person would have to conclude that an arbitrator was partial' to the other party to the arbitration." *Apperson v. Fleet Carrier Corporation*, 879 F.2d 1344, 1358 (6th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir.), *cert. denied*, 531 U.S. 878 (2000). The "alleged partiality must be direct, definite, and capable of demonstration, and the party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator." *Nationwide Mutual Insurance Co. v. The Home Insurance Co.*, 278 F.3d 621, 626 (6th Cir. 2002) (quoting *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 329 (6th Cir. 1998)). Because of the untimeliness of the motion to vacate, the court of appeals did not reach the merits of petitioners' claims.

Pitcairn, 324 U.S. 117, 125-26 (1945). The constitutional and prudential limitations on the exercise of the Court's jurisdiction ensure that cases will present concrete facts of record, not abstract or conjectural ones. The petition should therefore be denied because it essentially seeks an advisory opinion that would not change the underlying result of the court of appeals' decision.

C. Discovery Was Not Necessary Because the Case Did Not Merit Equitable Tolling

The third question presented in the certiorari petition – whether discovery should be required in a case asserting misconduct or conflict of interest by an arbitrator – likewise does not require review by the Court for the same reasons. Petitioners' attempt to show a circuit conflict by contrasting the court of appeals' decision below with a decision from the Eleventh Circuit in *University Commons-Urbana Ltd. v. Universal Constructors*, 304 F.3d 1331 (11th Cir. 2002), is completely unpersuasive. In *University Commons*, the Eleventh Circuit remanded for discovery on the extent of an alleged current conflict between the arbitrator and a party. *University Commons* did not involve equitable tolling because the motion to vacate was served on a timely basis. The *University Commons* decision merely states the proposition that, under appropriate circumstances, a party can seek discovery to establish issues raised in a motion to vacate. Nothing suggests that the Sixth Circuit and Eleventh Circuit are in fundamental disagreement about this issue, that there otherwise exists a circuit conflict, or that such an issue involving a discovery dispute warrants the attention of the Court.



CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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